

mantr
CL. Brit. Courts
REPORTS
OF
CASES
27
0
S

ARGUED AND ADJUDGED IN THE COURTS OF
KING'S-BENCH, COMMON-PLEAS
AND
EXCHEQUER:

TO WHICH ARE ADDED
SOME SPECIAL CASES
IN
THE COURT OF CHANCERY

AND
BEFORE THE DELEGATES;

IN THE REIGNS OF
KING WILLIAM, QUEEN ANNE, KING GEORGE I. and II.

WITH TWO TABLES;
ONE OF THE NAMES OF THE CASES,

THE OTHER OF THE
PRINCIPAL MATTERS.

THE SECOND EDITION.

By THE RIGHT HON. SIR JOHN COMYNS, KNT.

Late Lord Chief Baron of his Majesty's Court of Exchequer;

With References to Reporters, and other legal Authorities,

By LEONARD MAC NALLY, Esq. Barrister at Law.

D U B L I N :

PRINTED FOR JAMES MOORE, No. 45, COLLEGE-GREEN.

1791.

Rec. June 4, 1902

V
A
bo
Ba
Ca
Ki
Si
E

WE well knowing the great learning, ability and judgment of the Author, do allow and approve of the printing and publishing of this book, entitled, "*Reports of Cases argued and adjudged in the Courts of King's Bench, Common Pleas and Exchequer*"; to which are added some special Cases in the Court of Chancery and before the Delegates, in the reigns of King William, Queen Anne, King George I. and II. by the Right Hon. Sir John Comyns, Knt. late Lord Chief Baron of his Majesty's Court of Exchequer."

HARDWICKE. C.
W. LEE,
W. FORTESCUE,
J. WILLES,
T. PARKER,
LAW. CARTER,
J. FORTESCUE, A.
W. CHAPPLE,
M. WRIGHT,
JA. REYNOLDS,
T. ABNEY,
T. BURNETT,
T. DENISON,
CHA. CLARKE.

W
ma
Rn
pri
wh
bli
a n
pat
hav
nd
en
not
priv
sig
he

TO THE
RIGHT HONOURABLE
Sir WILLIAM LEE, Knt.

LORD CHIEF JUSTICE OF ENGLAND.

MY LORD,

WHEN the demands of the profession made it in a manner necessary that these REPORTS should from the obscurity of a private study be introduced to the Public, whatever difficulties might arise in the compliance, there surely could be no room for a moment's hesitation to determine whose patronage and protection they should claim; having I well hoped, and your Lordship's indulgence since, has confirmed me in that sentiment, a double title to your Lordship's, not only as one, for whom the author in private life was ever used to profess the highest personal honour and regard, but as the supreme magistrate of the common law,
presiding

DEDICATION.

presiding with so great reputation in that Court where they date their beginning.

The difficulty of succeeding a person so truly eminent as your Lordship's noble and learned predecessor, was too apparent to all the world; but I may venture with as much truth to add, that his Majesty (whose great regard and paternal affection for his subjects, can appear in nothing more than so worthily filling the seats of justice) never gratified them in a more sensible manner, than when he conferred that honour on your Lordship; for however excellent great abilities, and profound science are in themselves, however necessary to persons intrusted with the public sword of justice, they only become truly valuable to the rest of mankind, when governed and directed by the rules of honour, virtue and integrity. Thus regulated, my Lord, we are sure they will be made subservient to no bad purposes; it is then, they are quick to detect, but at the same time can for no sinister views be induced to palliate a falsehood; and this, give me leave to add, is the security, this is the satisfaction, the people of England at present enjoy under your Lordship's wise and worthy administration; but I beg pardon, for I fear this is an instance, (though I am sure it is the only one) where your Lordship would desire the truth should be suppressed; nor must I forget, that whilst I am gratifying myself, I not only *infirmis sermone detero*, but run the risque

D E D I C A T I O N.

risque likewise offending that known characteristick of your Lordship's, so justly compared by the ingenious Mr. Addison to the shades in fine colourings, which gives them all their due lustre, their several and peculiar advantages.

. Give me leave therefore, my Lord, only to add, that as I rely upon your known candour to excuse the trespass, I could not omit this opportunity of testifying my profound respect for your Lordship, and subscribing myself,

Your Lordship's

Most obedient

And devoted humble servant,

J. COMYNS.

1. The first part of the document is a list of names.

2. The second part of the document is a list of names.

3. The third part of the document is a list of names.

4. The fourth part of the document is a list of names.

5. The fifth part of the document is a list of names.

6. The sixth part of the document is a list of names.

7. The seventh part of the document is a list of names.

8. The eighth part of the document is a list of names.

9. The ninth part of the document is a list of names.

10. The tenth part of the document is a list of names.

11. The eleventh part of the document is a list of names.

12. The twelfth part of the document is a list of names.

13. The thirteenth part of the document is a list of names.

14. The fourteenth part of the document is a list of names.

15. The fifteenth part of the document is a list of names.

16. The sixteenth part of the document is a list of names.

17. The seventeenth part of the document is a list of names.

18. The eighteenth part of the document is a list of names.

19. The nineteenth part of the document is a list of names.

20. The twentieth part of the document is a list of names.

21. The twenty-first part of the document is a list of names.

22. The twenty-second part of the document is a list of names.

23. The twenty-third part of the document is a list of names.

24. The twenty-fourth part of the document is a list of names.

25. The twenty-fifth part of the document is a list of names.

P R E F A C E.

THE reader will observe, that some of the Cases, particularly those adjudged in the Court of King's Bench, and contained in the first part of this work, are already to be found in some late Reports, which put me at first in great doubt, whether it would be so expedient to publish them again; but upon consulting with my friends of the first eminence in the law, I was advised that it was no objection, where they did not appear to be in a manner *verbatim*, and even then, in very solemn cases or nice determinations, they would not be without their use; for as in the first of these instances, the manner of reporting the same case by different hands frequently throws a light upon the subject which would otherwise in some parts remain dark and obscure; so in the last of them it is a concurrent testimony, and as such, must add weight to

Salk.
Ld. Ray.

P R E F A C E.

to the authority ; however, notwithstanding these motives to the contrary, it is certainly true, that many cases are omitted either where the subject was thought too trite, or where the same case has been reported in two or three contemporary authors very near *in hæc verba* : So likewise it has been a rule in general to strike out those cases where the judgment of the Court does not appear ; not but that I have thought myself obliged to deviate from this likewise in some few instances, where the points have been either extremely well argued at the bar, or so far broke by the Bench, that their opinion might be clearly collected, and nothing farther done in the cause.

Reports, though it must be acknowledged already too voluminous, seem of all other law performances the most acceptable to the profession, and therefore this volume has been pressed into service : The cases in the Common Pleas and Exchequer being very much desired.

Defects and imperfections must be expected in all human performances, and as the greatest part of the original of this work
was

P R E F A C E.

was in Law *French*, it is possible that may in some degree contribute to them, though I am the more unwilling to surmise or suspect this, as I have been assisted in the translation, &c. by gentlemen of known learning and abilities in the profession, whose service I cannot omit this opportunity of acknowledging. However, sure I am, that the author, had he been living, would have sent them forth to a better advantage ; for though a Report in the nature of it, may be thought a work as little likely to suffer from a translation as any other, yet there are certain technical terms and idioms peculiar to every language and science, which appear best in their native dress, so likewise are there some particular expressions in the original, which tho' the author himself might have thought proper to alter, I fear the editor could not be justified in doing it. If upon the whole any thing in them contributes to the public advantage and emolument, the honour is due to his memory, and I shall rejoice ; whatever on the contrary appears in them either incorrect or imperfect, I hope the reader will candidly impute to the misfortune the public had in losing him before they went to the press,

J. C.

TO THE
RIGHT HONOURABLE
BARRY YELVERTON,
LORD CHIEF BARON
OF HIS
MAJESTY'S COURT OF EXCHEQUER
IN
I R E L A N D;

THIS EDITION OF REPORTS,
BY LORD CHIEF BARON COMYNS,
IS MOST RESPECTIVELY INSCRIBED,

BY HIS LORDSHIP'S

MOST RESPECTFUL

HUMBLE SERVANT,

LEO: MAC NALLY.

T A B L E
O F T H E
N A M E S O F T H E C A S E S.

Case	A.	Page	Case	Page	
8	ABBOT <i>and</i> Burton	160	205	Blunt, Crook & Hawkins	446
9	Abrahat <i>and</i> Bun	250	215	Bluet <i>and</i> Needs	522
10	Archerly <i>and</i> Vernon	381	236	Blacklock <i>and</i> Mariner	557
14	Ditto	513	116	Bodmyn, viscountess of, <i>and</i> Sir Richard Child	185
13	Almanzar <i>and</i> Davilak	94	194	Bockingham & Bentfield	392
14	Ashmed <i>and</i> Ranger	71	34	Britton <i>and</i> Cole	51
16	Athol & al'	158	222	Brice <i>and</i> Smith	539
15	Athelston & Moon & al'	547	270	Bury alderm. burgessees <i>and</i> Evans	643
10	Attorn. Gen. <i>and</i> Young	423	243	Bury stewd. of, & Rabutin	566
11	——— <i>and</i> White	433	280	Brotherow <i>and</i> Hood	725
11	——— <i>and</i> Perry	481		C.	
16	Austin <i>and</i> Osbourne	243	237	Cartlitch & Sir J. Eyles	558
	B		217	Castle <i>and</i> Bailey	528
11	Badge <i>and</i> Floyd	62	123	Chambers <i>and</i> Shaw	206
15	Bailey <i>and</i> Cheefely	114	231	Chambers <i>and</i> Gambier	554
17	Bank governrs. & Newman	57	268	Chesterfield earl, <i>and</i> Bolton, duke	627
10	Barton <i>and</i> Fuller	18	45	Clark <i>and</i> Smith	72
14	Barke & ux' & Palmer	141	133	Clanrickard earl, & Bourk	237
15	Barker <i>and</i> Lamplugh	142	223	Cornish <i>and</i> Trefey & al'	541
18	Barns <i>and</i> Outway	420	254	Cockerel <i>and</i> Armstrong	582
12	Bayly & Warburton, &c.	494	277	Cook <i>and</i> Cook	712
10	Bettifon <i>and</i> Savage	335	90	Coggs <i>and</i> Barnard	133
18	Bennet <i>and</i> Thalbois	26	162	Coventry, earl of, v. countess dowager of Coventry	312
15	Bishop <i>and</i> Burton	614	227	Craven <i>and</i> Hanley	518
17	Bird <i>and</i> Line	190			
16	Bishop <i>and</i> Brooks	303			
17	Blackal <i>and</i> Heal & al'	12			
15	Blackborrow <i>and</i> Davis	96			

TABLE OF THE NAMES OF THE CASES.

<i>Case</i>	<i>Page</i>	<i>Case</i>	<i>Page</i>
262 Crofts and Powel	603	253 Green and Roe	581
1 Culliford and Cardonell	1	74 Gree and Rolls	113
D.		50 Groenvelt & Dr. Burwell & al'	
135 Daw and Newborough	242	centrs. of coll. of physicians	76
47 Day and Snellgrove	74	49 Gregory and Wallup	75
191 Dean and Coward	386	H.	
180 Depapa and Ludlow	360	2 Hains and Jefferies	2
118 Dighton & Thomlinson	194	159 Hall and Downes	309
29 Dorn and Gashford	44	89 Hale and Owen	132
98 Dummer and Birch	146	113 Hammond and Hill	180
E.		218 Hands and James	531
176 East Ind. comp. & Atkins	347	59 Harman and Owden	89
107 Edmond and Shaler	159	109 Harvey and Richardson	161
163 Ellerton and Gastrell	318	101 Harding and Harding	148
193 Evans & vic' Falkenberg	391	195 Harrison and Hart & al'	393
91 Ewer and Jones	137	257 Harrison and Ridley	589
F.		244 Harvey and Stoakes	566
202 Falkland vic' and Phipps	439	281 Harvey & al' & Aston & al'	726
250 Fawcet & Strickland & al'	578	157 Hedgthorn and Thurlock	305
73 Feltham and Cudworth	112	30 Heylin and Hastings	54
274 Fenns governrs. & Hare	694	103 Higginson and Sheriff	153
58 Fisher and Wicks	88	60 Hilliard and Jennings	90
145 Field and Workhouse	264	110 Hole and King	162
93 Fitzgerald and Cragg	139	111 Hopewell and Achland	164
112 Fitzherbert and the chancrlr. and scholars of the university of Oxford and Reeves	169	213 Howes and Haslewood	555
177 Fowler and Blackwell	353	261 Hodgson and Atkinson	603
213 Fox and Bardwell	498	164 Huddy and Gifford	321
72 Freke and Thomas	110	184 Hughs and Clubb	369
122 Fison and —	205	125 Hunt and Coles & al'	226
G.		62 Hunt and Bourne	93
42 Gage and Action	67	264 Hungate and Fothergill	613
173 Gally and Selby	343	279 Hutchins and Fitzwater	716
14 Gale and Ewer	22	143 Hufley and Hufley	260
230 Gambier and Larkin	553	4 Hufley and Jacob	4
162 Gilbert, earl of Coventry, and Countess dowager	312	232 Huxley and Clendon	554
242 Goodtitle & Bradbourne	564	I.	
35 Goodwin and Bearbank	53	105 James and Mathews	157
255 Grant and Gordon	583	11 Johnson and Lee	18
		6 Jones and Bodingham	8
		20 Jones and Moseling	29
		271 Jones and Meredith	661

TABLE OF THE NAMES OF THE CASES.

<i>Case</i>	<i>Page</i>	<i>Case</i>	<i>M</i>	<i>Page</i>
39 Juxon & ux' and Nayler	60	84 Machel and Clerk		119
38 Iveson and Moor	58	272 Mackenzie and marquis of		
K.		Powis		675
189 Keld and Harding	378	208 Makepiece and Fletcher &		
203 Kennet, lord Duffus, in the		al'		457
house of lords	440	246 Matlem and Bingloe		570
8 The King and Keate	13	152 Marriot and Shaw		274
226 ——— and Harris	547	247 Matravas & Adlam & al'		573
43 ——— and Chalbury	71	80 May and King		116
53 The King and ———	86	258 Mills and Davis		590
54 The King and ———	ibid	160 More and ———		307
66 ——— and the inhabitants		158 More and Manning		311
of Gravesend	97	248 Moravia and Sloper		574
70 ——— and Eller	109	220 Moxon and Horsenail		534
71 ——— and Tyler	ibid.	169 Mudge and Mudge		333
134 ——— and Osbourne	240	N.		
161 ——— and Pond	312	209 Nash & East-india com.		462
55 ——— and corp. of Rippon	86	219 Newbury and Stradwick		533
179 ——— and bish. of Hereford	358	155 Newland and Collins		302
181 ——— and bish. of Durham	361	51 Nottingham and Jennings		82
15 ——— and Clerk	24	221 Noxton and Lilly		537
19 ——— and Thorpe & al'	27	O.		
27 The King and Gripe	43	263 Osbaldiston and Crofs & al'		612
192 ——— and Clark	388	278 Owens and Smith		715
199 ——— and Huggins	422	P.		
210 ——— and Frances & al'	478	79 Palmer and Stavely		115
267 ——— and Manning	616	52 Parker and Keck		84
40 ——— and Harris	61	148 Parry and Berry		269
L.		121 Parslow and Cripps		204
78 Lamplugh and Shoridge	115	251 Pardo and Fuller		579
81 Lancashire & Kelingworth	116	82 Parsons and Gill		119
104 Landon and Bessingham	156	119 Peat and Ougly		197
68 Lane and Cotton & al'	100	56 Pett and Pett		87
12 Lately and Pry	19	204 Pitt, the case of		444
83 Levin and ———	118	3 Petit and Smith		3
238 Leaver and Witcher	561	178 Pickering and Appleby		354
228 Lemargus and Newman	551	140 Pigot and Penrice		250
207 Limbey and Mason	451	96 Poulton and Goddard		142
137 Loveday and Mitchel	247	146 Powell and Bull		265
13 Loyd & al' & Carew & al'	20	48 Presgrave and ———		75
132 Lutham and Jarret	236	128 Prideaux and Roberts		231

TABLE OF THE NAMES OF THE CASES.

<i>Case</i>	<i>Page</i>	<i>Case</i>	<i>Page</i>
120 Pelling and Whiston	199	273 Scot and Schawrtz	667
216 Phillips and Fowler	525	131 Steward and Allen	235
153 Phillips and Smith	279	276 Skirme and Meyrick	700
197 Piper and Thompson	418	5 Stroud and Birt	7
<i>Q.</i>		23 Sutton and Moody	34
88 The Queen and Barnaby	131	<i>T.</i>	
<i>R.</i>		175 Tashmaker and hundred of	
33 Ram and Thatcher	50	Edmonton	345
142 Reeves and Trindle	257	30 Thompson and Leach	45
249 Reason and Lisle	576	167 Thomlinson and Ariskin	328
86 Reding and Royston	123	124 Thornby and Fleetwood	207
26 Richards and Cornford	42	67 Thorpe and Thorpe	98
234 Richardson and Pattison	555	245 Trevet and Angus	568
130 Right and Hammon	232	9 Truelock and ———	17
259 Roe and More	597	22 Turbervil and Stamp	32
185 Robnson and Mead	371	<i>V.</i>	
57 Roche and Layton	87	166 Vaifey and hundred of	
182 Rogers and Wilson	365	Whiston	327
275 Rudge and Chapman & al'	697	<i>U.</i>	
206 Rushworth & Mafon & al'	448	16 Upshaw and Aidee	25
<i>S.</i>		147 Upton and Pinfold	267
149 Saunders and Stevens	270	<i>W.</i>	
105 Salmon and Denham	323	168 Wall and Fulwood	330
224 Scrape and Rhodes & al'	542	150 Walker and Holyday	272
171 Scot and Alberry	337	187 Walker and Lester	376
115 Shelf and Bailey	183	188 Walker and Priestly	ibid.
229 Smith and Richardson	552	166 Walter and Drew & al'	372
85 Smith and Waldgrave	122	269 Wallis and Pain	633
239 Shelly and Wright	562	92 Ward and Evans	138
127 Southgate and Chaplain	230	76 Warner and Green	114
256 Speed and Martain	587	172 Wagstaff, Rider and Tra-	
141 St. Amand and countefs Jer-		vell	341
sey	255	235 Wayman and Wayman	556
24 Smalcomb and Buckingham	35	154 White and Collins	289
183 Stedman and Hay	366	25 Winter and Loveday	37
241 Spinks and Bird	564	196 West & al' and Erify	412
97 Stonehouse and Ilford	145	260 Win and bishop of Bangor	601
240 Skip and Hooke	563	<i>Y.</i>	
77 Storling and Tanner	115	129 Yalden and Hubbard	231

DE

Term. Sanct. Hill.

7 Will. III. in B. R.

Sir John Sommers, *Custos Sigilli.*

Sir John Trevor, *Magister Rotulorum.*

Johannes Holt *Miles, Cap. Just.*

Will. Gregory *Miles*

Tho. Rookeſby *Miles* } *Just. de B. R.*

Sam. Eyre *Miles*

Geo. Treby *Miles, Cap. Just.*

Edw. Nevil *Miles*

Joh. Powell *Miles*

J. h. Powell *Miles*

} *Just. de C. B.*

Edwardus Ward *Miles, Cap. Bar.*

Nicholas Lechmere

Johannes Turton

Littleton Powys *Miles*

} *Baronnes de Scaccario.*

Culliford and Cardonell.

Case 1.

IN DEBT upon bond the defendant demanded Oyer, by which it appeared, it was made to render an account to the plaintiff of the profits of an office in the Custom-house, and to pay him the half-part of them; and afterwards pleaded, that by the statute 5 & 6 Ed. 6. cap. 16. If any person shall sell any office, or deputation of any office, &c. or take any money, bond, &c. for any office, or deputation of any office, which concern administration of justice, &c. or any the King's customs, &c. he shall forfeit office and right of deputation, &c. and such bond shall

Security to account for the profits of an office, not a sale within the statute of Ed. 6 cap. 16. 2 Salk. 466. 468. 6 Mod. 234. 3 Keb. 552. be 659, 678, 711, 717.

De Term. S. Hill. 7 Will. 3.

[2] be void : And that the defendant was made deputy to the plaintiff in his office in the Custom house, who took his bond corruptly for the grant of such deputation. Upon which there was a demurrer ; and adjudged for the plaintiff ; for his bond is not within the statute of 6 Ed. 6. being only for part of the profits, which the defendant receives, and is no more than if the plaintiff makes a deputy and allows him a salary ; for here he allows the defendant a moiety of the profits for his salary, and the security taken for the other moiety is not a sale or corrupt bargain for the deputation ; otherwise if the defendant had given a sum in gross at first, or had given covenant for a certain sum to be annually paid the plaintiff.

Cro. Car. 361.
Cro. Jac. 269.
2 Vent. 79.
Comb. 356.
S. C.
Caf. B. R. 9.
Holt 506.
2 L. Raym. 1245.
2 Will. 133.
2 Salk. 411.
2 L. Raym. 1378.
Comb. 228.
Holt 341.
4 Burr. 2495.
4 Mod. 215. 1 Hawk. P. C. 67. Tit. Brib. 168. 169. Corruption an offence within the statute. 4 Burr. 1236.

Judgment for the plaintiff.

Case 2.

Haines and Jeffreys.

Marrage of
bastard
within Le-
vitical de-
grees.
39 Ed. 3.
11. a.
Swinb. 310.

PROHIBITION was prayed to the Spiritual Court, where there was a libel for an incestuous marriage, for the plaintiff had married a bastard of his sister. And Sir BARTH. SHOWER urged, that this was not within the degrees prohibited by the statute of 32 Hen. 8. for a bastard was not the daughter of any one. 1 Inst. 123, 157. 6 Co. 65. A bastard is the son of no one, nor has any relation, but is the fountain or original of his own blood, for he derives blood of no one. 41 Ed. 3. 9. b. 1 Bendl. 102.

DOBBINS on the other side quoted the argument of the Bishop of Worcester, and he says, the words in *Leviticus*, which we translate, *you shall not approach to your next of kin*, in the Hebrew tongue is, *you shall not approach to the remainder of your flesh*; the vulgar Latin says, *ad proximam sanguinis sui*, by which it appears, that the intent of the prohibition was to prohibit an approach to any that was of his blood, and so the expositors extend this precept to persons who proceed as well from an illegitimate, as from a lawful embrace. Vide 99 Can. 1603. 2 Inst. 683.

[3]

Lord CHIEF JUSTICE held, and all the Court seemed to think, it would be very mischievous if a bastard should not be

De Term. S. Hill. 7 Will. 3.

be accounted within the statute 32 Hen. 8. for by that rule a man might marry his own daughter ; and where it is said, that a bastard is the son of no one, this is in civil respects, and where there is an inheritance.

Petit and Petit, Executors of Richard Petit, and Smith. Case 3.

PROHIBITION was moved for to the Spiritual Court, where it was attempted to make the executors distribute according to the statute of distribution 22 & 23 Car. 2. c. 10. And upon a consultation it was urged, that executors are only trustees of the goods of the testator, and have them to administer according to the intention of the testator, and where they have paid his debts and legacies, then it is but reasonable that they distribute the surplus to the next of kin to the testator ; and there was a case cited of a decree in Chancery between *Frost, al' Forrest, v. Munt*, where the testator had made the defendant his executor, and devised to him as follows, viz. *I give unto my executor the sum of 5l. only* ; and it was decreed that the executor should be accountable for the residue ; for the intent of the testator appeared to be, that his executor should have only 5l. But the Court here inclined, that a prohibition should go ; for the case cited depended upon the special words of the will, and did not extend to the present case.

Roll. 316, 369. 1 Vern. 170. 233. Style 456. 2 Mod. 204. Hob. 83, 191. 3 Mod. 58. Holt. 259. 2 Vent. 317. Lev. 233. 1 P. Will. 7, 25, 27, 42, 51. Cart. 125. 3 Cal. B. R. 409. Raym. 496, 499. Comb. 378. Ld. Raym. 86. 5 Mod. 247. 2 P. Will. 158. 1 Stra. 568. S. C. 3 P. Will. 40. 2 Vern. 676 where a pecuniary legacy has been given to a sole executor.—Where equal pecuniary legacies to two or more executors 1 Vern. 473. 2 Vern. 676 Proceed. in Ch. 81. 3 P. Will. 194 (note) 544. 2 P. Will. 162. 2 Vez. 162. Where specific legacies are given to one or more executors 2 Vern. 425. 3 Atkins 230. 226. Brown's Chauc. Cal. 154. Distinctions taken in cases on this subject, See 1 P. Will. 544. Proc. in Cha. 566. 10 Mod. 442. 2 Eq. Ca. Abr. 421. pl. 2.

At the end of Easter term 7 Will. 3. Sir WILLIAM GREGORY, one of the Justices of the King's Bench, died, and in the Trinity term following Sir JOHN TURTON, one of the Barons of the Exchequer, was removed to the King's Bench, and took the third seat in that Court.

Term. Sanct. Trin.

8 Will. III. in B. R.

[4]

Case 4.

Hussey and Jacob.

When a man shall avoid a bill for money lost at play by the statute of 16 Car. 2. c. 7. All bills of exchange, promissory notes, &c. upon gaming confederations are void, Stat. 9 Anne ca. 14
 2 Burr. 1077.
 4 Burr. 2018.
 Loser may bring an action for money lost at play.
 2 Black. Rep. 1226.
 Espinass N. P. 26, 90.
 Money won in France is void by the law of France as well as of England;
 2 Burr. 1080.
 Courts of Justice have always in-

ASSUMPSIT. The plaintiff declares upon the custom of merchants, by which, if a bill of exchange is drawn upon a person, and he accepts it, he is liable to pay it; that the Lord Chandos had drawn a bill upon the defendant for the payment of 120 pieces of gold, called guineas, to the plaintiff, and the defendant accepted thereof, and afterwards refused payment. The defendant pleads the statute 16 Car. 2. c. 7. and that the plaintiff had played with the Lord Chandos at a game called hazard, and that the Lord Chandos had lost 120 guineas, and this bill was given for the security of that money. Upon which it was demurred: And argued by Sir Barth. Shower for the plaintiff, that this plea amounts to the general issue; for on *non assumpsit* pleaded he might give the statute of 16 Car. 2. c. 7. in evidence, and therefore he shall not be admitted to plead the special matter, where it may be given in evidence upon the general issue. *Sed non allocatur*; for in every case, where the defendant may avoid the action of the plaintiff for matter of law, he may there plead specially, notwithstanding that the same matter may be given in evidence upon the general issue, and shall not be obliged to take the general issue, and leave the matter of law to the verdict of a jury; as in an action brought upon a bond, the defendant may plead that she was under coverture at the time, although such matter may be given in evidence upon *non est factum* pleaded; and in conspiracy, the defendant may well shew a probable cause for his suspicion in his plea, and is not obliged to plead the general issue. Cro. Eliz. 871, 900. 1 Vent. 2. 2 Vent. 295. 2dly, That the defendant cannot have the advantage of the statute 16 Car. 2. c. 7. for the money is not lost by him, but the action lies against him upon another contract, for the acceptance of the bill makes the defendant chargeable; and if a man promises

mises another, that if he will forbear to sue him for so much money, which was won at play, he will pay at such a time; *assumpsit* lies upon such promise, for there is another consideration, the forbearance being the cause of the promise: And the mischief will be very great, if a person may avoid payment upon a bill after his acceptance of it, for that the original cause of such bill was upon an usurious contract, or for gaming, &c. If the plaintiff had sent his bill to *Constantinople*, and it had been there accepted, should it be avoided there for that it was given for money won at play? such a construction will be very prejudicial to trade; so in this case it is not said, that the acceptance by the defendant was for the security of the money which the plaintiff won at dice. *Sed non allocatur*; for the acceptance by the defendant was not upon another consideration, but was a better assurance for the money due from the Lord *Chandos*; and the statute avoids all contracts, judgments, bonds, bills, &c. and other acts, deeds or securities whatsoever given for security or satisfaction of such money; so that the statute is not restrictive as to securities made by the party only who loses the money, but also for those made by any other person for him: And if a man gives security for money that A. had lost (at play) it is void, as much as if he had given it himself: And although the plea does not say, that the defendant accepted the bill for a further security, &c. yet it is said, that the plaintiff had won 120 guineas at hazard of the Lord *Chandos*, who drew the bill upon the defendant for the security of the same 120 guineas, and the defendant accepted of the same bill; by which it appears, that it was for security of the same 120 guineas; and the mischief that has been urged is not within the present case.

128. 2 Mod. 279. A bond given as collateral security by a third person for money won is void. 1 Will. 220. 2 Term. Rep. 439. Wager concerning the right manner of playing, not within the statute. 1 Salk. 344. Carth. 322. 4 Mod. 1, 409, 410. 5 Mod. 1, 4. 2 Mod. 54, 179. 1 Lutw. 284, 487. 1 Sid. 394. 1 Lutw. 434. S. C. N. L. 143. Skinn. 572. Comb. 327. Cases B. R. 81. Holt 550.

HOLT C. J. thought, and it was not denied of any of the judges, that if the plaintiff had assigned his bill to another person for satisfaction of a just debt due to him from the plaintiff, and the defendant had accepted it, this would have been a lien upon the defendant to such a third person; as where a man makes an usurious contract to B. for payment of money due to B. and B. is indebted in the same sum to C. and B. for satisfaction of the debt which he owes C. makes

[5]

clined against gaming contracts.

2 Vern. 70.

Defendant

a rested for

money won

at play dis-

charged on

a common

appearance.

2 Will. 67.

Where a

bond is given

for a gam-

ing debt,

the statute

must be

pleaded.

1 Strang.

498.

1 Roll. Ab.

113.

Cro. Jac.

130.

Yelv. 105.

116.

Dug. 215.

1 Term. Re.

520.

2 Term. Re.

231.

Prohibitions

against gam-

ing by for-

rein laws.

1 Black. Re.

258.

Mod. Caf.

[6]

De Term. S. Trin. 8 Will. 3.

makes the man give his bond to pay to C. the same sum, which he owes to B. upon the usurious contract; such person shall not avoid the payment to C. because of the usurious contract made with B. But,

Winner
shall not re-
cover on a
bill for mo-
ney won at
play against
an acceptor;
otherwise of
an indorsee.
Carth. 356.
Holt. 328.
Cas. B. R.
96.
Skin. 195.

For money
lent at play.
2 Burr.
1080.
1 Black.
Rep. 234.
S. C.
Carth. 365.
5 Mod. 175.
1 Salk. 344.
1 L. Raym.
87.
2 Strange
1155.
3 Strange
1249.
2 Will. 309.
1 Black.
Rep. 671.
Ld. Raym.
1366.
Strange
1159, &
Stat. 18
Geo. 2. c. 34.

2 Black Re. 706. Strange 1159. Cricket is a game within stat. 9 Anne c. 14. 1 Will. 220. A foot race is within stat. 9 of Anne ca. 14. Cowp. 281. 2 Will. 36. Doug. Rep. 636, 743.

[7]

Case 5.

Stroud and Birt.

Where the
plaintiff is
not obliged
in his decla-
ration to
shew any
title in him-
self.

Sir BARTHOLOMEW SHOWER said, that then if a man loses at dice, and gives a bill payable to the winner, or order, for the money, and the winner indorses the bill to another, he shall avoid the statute 16 Car. 2. cap. 7.

HOLT answered, that this was not the case in question; but that his opinion was, that if such a note was given to the winner or order, and the winner indorsed it to a stranger for a just debt, and the person upon whom the bill was drawn, accepts of it in the hands of the stranger, the acceptor would be liable.

3dly, It does not appear by the plea, that the Lord Chandos and the plaintiff played upon tick or credit, and the statute does not avoid the payment where the plaintiff plays with ready money. *Sed non allocatur*; for it is said, that the plaintiff and the Lord Chandos played together, and that the Lord Chandos lost 120 guineas, and that for security of them the bill was given, which shews that the play was not for ready money, and then it is within the statute. And,

HOLT C. J. said, that it had been lately adjudged, that where an agreement was made for an horse race, to run four heats at 40l. a heat, and as many more as the parties should agree, and an action was brought for the money lost upon two heats only, which was within the sum of 100l. yet it was within the statute; for the agreement was intire for four heats, which amounts to above 100l. and although it happened that only two heats were run, yet the plaintiff should not recover for them. See the case now reported by *Ventris*, 253. And judgment in the principal case here was given for the defendant.

ERROR on a Judgment in the Common Pleas in an action upon the case, wherein the plaintiff declared, that he was possessed of a certain ancient mill and certain lands in *Shipton Mallet*, and ought to have Common in 100 acres of land, called *Mendip Forest*, for all commonable cattle

cattle levant and couchant upon the said lands; and that the defendant dug coney-burrows, and stocked the said common with conies, by which he could not have the use of the said common in so beneficial a manner. Upon which the defendant demurred; for that the plaintiff had not shewn any title to the common, either by grant or prescription: And judgment was given in the Common Pleas for the plaintiff. And upon error brought in B. R. the same error was assigned; but the judgment was affirmed by the whole Court. And,

HOLT C. J. gave the causes of their judgment, viz. The plaintiff is not obliged to shew any title in himself to the common in his declaration. 1st, Because this action is founded only upon the possession, which is sufficient to maintain the action for the plaintiff. 2dly, Title to the Common need not be alledged by the plaintiff; for that it did not appear whether the defendant who committed the tort was owner of the soil or a stranger; but if the defendant had appeared to be owner of the soil, then the plaintiff must have shewn a title: As in case the plaintiff had brought an action of trespass for the taking of his cattle, and the defendant had justified the taking for damage-feasant in his freehold; there the plaintiff in his replication must shew that he had common in the same place, either by grant or by prescription. 3dly, The title of the plaintiff is not traversable by the defendant, but if it were necessary, the plaintiff might give it [the title] in evidence: And the principal case upon which the Court relied was a judgment of Mich. term 27 Car. 2. between *St. John* and *Moody*, where in an action on the case the plaintiff declared, that he was seised in fee of twenty acres of wood, and that the defendant stopped up a way which the plaintiff had to the wood, but did not shew any title to the way; and after verdict for the plaintiff this was moved in arrest of judgment; and by HALE C. J. and all the Court, judgment was given for the plaintiff; which is an express authority in point; and although the plaintiff in that case declared that he was seised in fee, it is no more than if he had said that he was in possession; for it is not material to alledge a seisin in fee, but where the party makes prescription to a common, a way, &c. This case was after a verdict indeed; but HALE and the whole Court agreed, that the same rule should have been given in it if it had been before a verdict; as HOLT C. J. said he well remembered. And,

[8]

ROOKEY

De Term S. Trin. 8 Will. 3.

ROOKEY Justice said, that the judges all agreed in the judgment in the principal case, for the reasons declared by the Chief Justice; and begged leave to mention a case adjudged in the Common Pleas between *Blockley* and *Slator*, Hill. 4 & 5 W. & M. rot. 1771. An action of the case was brought for stopping up a way, and there was a demurrer to the declaration; and it was divers times argued that the declaration was ill, for that the plaintiff had not shewn any title to the way; and after much debate, it was adjudged for the plaintiff; which he took to be the same case with the present, except that there the plaintiff claimed an easement, and in the present case an interest. But,

HOLT C. J. said, that a way to a church, &c. was no more than an easement, but that a private way to a particular estate seemed to be an interest; and judgment was affirmed by the whole Court. Vide 2 Vent. 186. 1 Vent. 274, 275. 2 Vent. 292.

Case 6.

Jones and Bodingham. In B. R.

Judgment,
when it shall
be taken up-
on the plea,
and when
upon con-
fession or
nil dicit.
1 L. Raym.
90. S. C.

TRESPASS for taking cattle. The defendant pleads, that upon a transcript of a *capias utlegatum* and inquisition from the Common Pleas, a *levari facias* issued out of the Exchequer, tested Hill. 6 W. & M. and a warrant thereupon to the defendant as bailiff, by virtue of which he took the cattle in such land of the person outlawed. The plaintiff replies, that the cattle were taken in other land, and traverses the taking in the land where it was alledged by the defendant; and this was found for the plaintiff.

[9]

NORTHY for the defendant argued, that judgment in this case ought not to go for the plaintiff upon the verdict; for the plea of the defendant, that a *capias* issued in Hill. 6 W. & M. is altogether void and nugatory, it being impossible that a *capias* should have issued Hill. 6 W. & M. inasmuch as the Queen was dead before, viz. on the 28th day of December 1694, and so there was no such term as *Hillary* the 6th of *William* and *Mary*, but *Hillary* the 6th of *William* the Third only; and whenever the plea of the defendant is altogether void, judgment shall not be entered upon the plea, but upon *nil dicit* or confession, and a writ of inquiry shall be awarded; as in an action of debt brought against an executor for 4*l.* and he pleads, that the testator was indebted to him in 40*l.* and that goods had come to his hands

De Term S. Trin. 8 Will. 3.

hands to the value of 10*l.* the which he retained, &c. and no other goods, &c. and the plaintiff replies, that he was executor of his own wrong, and hath other goods; & *hoc paratus est verificare*; notwithstanding the plaintiff's replication concluding with an averment is ill, (for he ought to have concluded to the country) yet he shall have his judgment upon the confession only of the defendant.

Yelv. 138. And this diversity was agreed *Cro. Eliz.* 227. 2 Roll. Abr. 99. Trespass for taking five horses; the defendant justifies by a custom to distrain the horse in the possession of a person amerced at the Leet; issue thereupon joined, and a verdict for the plaintiff, and judgment for him; but it was reversed, 214. 1 Salk. 173. for that such prescription is void, and so no judgment could be upon the verdict; it would be otherwise where the plea contained matter of bar, and issue was joined upon an immaterial point. The same diversity is taken *Mo.* 867. Debt upon an obligation, *Pas.* 1 *Car.* the defendant pleaded a judgment against him as executor the 5th of the now king, (where it ought to have been the fifth of King James,) and no assets *ultra*, &c. the which is a void plea; yet it is said judgment shall be for the plaintiff, although not upon the verdict. *Cro. Car.* 25. And the same distinction runs through all the books; if the plea of the defendant is altogether void, judgment shall go against him by confession or *nil dicit*; but where the plea of the defendant would have been a good bar, if it had been well pleaded, but is ill pleaded, and the issue thereupon is tried, there the judgment shall go upon the verdict; as where the defendant pleads concord without satisfaction, *Cro. Eliz.* 778. for concord is a good bar in trespass; but it is not well pleaded without satisfaction; so in the case there cited, payment is a good plea to debt upon a single bill; but it is not a full bar without acquittance. In avowry for the penalty for destruction of deer upon the statute 13 *Car.* 2. c. 10. to which the defendant was abetting, That he did not abett is a proper plea, for it denies the very cause of action; although the defendant is estopped to plead this matter by the conviction, *Raym.* 458. and the case there cited in an action of debt upon a bond against an executor, who pleads *non est factum* generally, this is a proper bar to debt upon a bond; but the executor ought to have shewn that he denies the same deed upon which the action is founded.

Sir BARTH. SHOWER on the other side cited many cases *Cro. Eliz.* 260, 455, to the same effect with that in *Cro. Eliz.* 778. and said there 881. was

De Term. S. Trin. 8 Will. 3.

5 Co. 43. no difference between them and the case at bar; for the plea
 Ld. Raym. at bar was in substance good, if it had been true and well
 90. pleaded; for if there were a *levari facias* awarded, and a
 In what case warrant thereupon, and a taking by force of such warrant
 a replader in the land of the person outlawed, this had been a good
 may be awarded. justification for the defendant. To which,
 1 Salk. 1. **HOLT C. J.** and the Court inclined; because the verdict
 S. C. being found for the plaintiff, the merit of the case appears
 5 Mod. 310. on his side: And,
 225. **HOLT C. J.** thought that the diversity taken by **NORTHY**
 Comb. 379. was not maintainable; for in ejectment, where the defendant
 Carth. 370. pleaded a demise to himself for years, and that he was pos-
 Holt. 149. sessed until the lessor of the plaintiff disseised him, the plain-
 Cro. Eliz. 318. tiff traversed the disseisin, and it was found that the plaintiff
 Mod. Ca. 2. 3. did not disseise the defendant; altho' the plea in that case was
 3 Cro. 52. altogether void and impossible, yet judgment went against
 1 Leon. 78. the defendant upon his plea. 2 Cro. 678. Entry without
 1 Lev. 32. [11] expulsion is a void plea in bar of rent, nevertheless judgment
 2 Lev. 135. shall be given thereupon. Hob. 326. And he said, that in
 Mo. 696. such case judgment cannot be given upon *nil dicit*; for
 Yelv. 89. judgment by *nil dicit* is no more than an implied confession;
 1 Cro. 25. but where the defendant takes upon himself to plead, and
 214. his plea is void, it shall not be intended that he says nothing
 Hob. 327. to the action, for this would be to make an implied impli-
 3 Cro. 722, cation; but whenever the defendant has directly confessed
 778, 227, the action, there the judgment shall be upon his confession,
 214, 445. and not upon his bad plea.
 Cro. Jac. 670.
 1 Saund. 128.
 Raym. 458.
 Doug. 396, 747. See 5 Com. Dig. 90. Pleader (E. 42) 185. Pleader (Y. 1. 2.) 5
 Vinet's Ab. Tit. Confession.

Term. Sanct. Mich.

8 Will. III. in B. R.

— and Blackhall *ver.* Heal and others. Case 7.

TRESPASS. The plaintiff declares for a trespass committed on the first of February, in the 8th of the present King, and the declaration was delivered in Easter term last, and issue joined upon not guilty pleaded, and a verdict was found for the plaintiff. And,

Sir BARTH. SHOWER moved in arrest of judgment, for that it appears that the action was brought before the cause of action commenced; for the plaintiff declares for a trespass committed on the 1st of February in the 8th of King William, but the action is commenced in Easter term the 7th of King William, and the cause is tried in the 7th year of King William; and so damages are given for a trespass which appears by the record not to have been committed at the time of the trial.

Where a verdict aids a fact alleged in the declaration at a day impossible, but not a day between the declaration and the verdict.
3 Salk. 8.
1 Lev. 299.

Sed non allocatur; for NORTHY and the Court took this diversity, that where the plaintiff hath declared for a trespass committed on a day after the filing of his declaration, and before plea pleaded, this is not aided by a verdict; for the jury has all that time in their consideration, and so may assess damages for the whole time, as well as for the day named in the declaration, which must be ill for all the time before the action commenced; for a man shall not have an action before the cause of action arises; and this was the reason of the case 2 Saund. 169.

An impossible time is no time.
Hob. 189,
245, 277.
Cro. Eliz.
68, 110.
Ld. Raym.
463.
1 Bac. Abr.
13.

HAMBLETON and VERE urged on the other side; for there an action on the case was brought because the defendant had enticed away his apprentice, who was to serve him for nine years, which were not all expired, *per quod servitium amisit per totum residuum termini prædicti, &c.* and there was a verdict for the plaintiff, and intire damages assessed, which was ill; for the plaintiff declared for the loss of the service for all the time to come, but ought to recover only for

for the time past ; for his apprentice might return and serve the residue of his term : But in the present case the plaintiff declared of a day not yet come, which is as of no day at all ; for it is impossible that the jury can give damages for a trespass committed on a day that never was ; therefore of necessity it must be that the plaintiff proved in evidence a trespass committed before the action brought, otherwise he could not have had a verdict for him ; and so the verdict hath aided this mistake of the day ; and so it hath been adjudged before in this court, Pasch. 24 Car. 2. *inter Shorter* and ——— And now,

Judgment was given for the plaintiff.

2 Cro. 211. And in another case between *Wall* and *Duke* this term, where the plaintiff declared upon a trespass committed *diversis diebus & vicibus*, without alledging any day ; after verdict it was held to be aided by the Court.

After judgment for the plaintiff [in the principal case,] it was moved by *NORTH*, that judgment should be entered of Trinity term ; for that one of the plaintiffs had died between the last and the present term, and the act of the Court in taking advice to this term should not prejudice the party ; but it was denied: For *per*

HOLT C. J. here is a continuance by the *curia advisare* vult over to this term, and therefore judgment shall not be entered before.

Case 8.

The King and Keate. In B. R.

Homicide
when it is
murder.

[14]

THE defendant was indicted for MURDER, and also upon the statute 1 Jac. 1, c. 8. that takes away the clergy from him who shall stab or thrust any person that hath not then any weapon drawn, or that hath not then first stricken the party who shall so stab or thrust, &c. The jury upon both indictments found specially, that *Keate* (the defendant) had hired one *Wells* to serve him as his gardener, and being minded to turn him out of his service, sends another of his servants to *Wells* to bid him deliver up the key of the garden, who brought back answer to his master that *Wells* would not deliver up the key ; *Keate* goes out of his parlour, fetches his sword and goes into the kitchen where *Wells* was, and interrogates him why he would not deliver up the key ; *Wells* replies, that he might have it if he would ; then

Keate

De Term. S. Mich: 8 Will. 3.

Keate drew his sword and cut Wells on the head with it; Wells with a slead, viz. the handle of a scythe which he held in his hand, strikes at his master, but by the rack in the chimney the blow was prevented; Wells punches his master several times with the slead on the belly, who retires back to the middle of the kitchen towards the door; then Keate runs Wells into the left pap with the sword, whereof he died: And if the Court adjudges this to be murder, or within the statute, they find Keate Guilty, &c.

COWPER, King's Counsel, insisted that this was murder; and he principally insisted, that where a man kills another without sufficient provocation, it is murder; for every provocation doth not suffice to make it manslaughter. *Hale's Pleas of the Crown.* Hale 474.

As to the indictment upon the statute 1 Jac 1 c. 8, he said, that if the offence were only manslaughter, it shall nevertheless be within the statute of 1 Jac. the intent of which statute was to take away the benefit of the clergy from him who should kill another, who had not any sword or other arms for his defence at the time of the assault; for if he be assaulted, and afterwards strikes with a candlestick, book, or other such thing which was in his hand at the time of the assault, this shall not be a weapon drawn within the act; so the slead which Wells had in his hand shall not be said to be a weapon, and the strokes which he gave to his master, after the stroke given by his master with the sword, shall not be within these words (not having then first stricken;) for it is natural for any person in the apprehension of death to take any thing near at hand to defend himself from the strokes of another; then it is not to be distinguished from the case of *Vincent Byard*, reported by Sir William Jones 340.

[15]

Sir BARTH. SHOWER *contra*. By this verdict it does not appear who struck the first stroke, for it is not said that Keate had struck his servant before the servant had punched his master; but if the verdict were certain, this cannot be within the statute; for the slead in the hands of the garden-er was a weapon drawn within the statute; so a cudgel, style 86. Allen 43. Godb. 154. And upon the other indictment it shall not be murder: True it is, that at common law all homicide or killing was capital until the statute of Marl. which says, *Murdrum de cetero non adjudicetur coram justic' ubi infortunium tantummodo adjudicatur est, sed locum habet*

De Term. S. Mich. 8 Will. 3.

Foster's Cr. Law, 264. *habet murdrum de interfectis per feloniam tantum, & non aliter.*

2 Inst. 148. There it appears, that homicide *per infortunium*

was murder; so *Se defendendo*, 21 Ed. 3. 176. 3 Inst. 55.

Foster's Cr. Law 257, 262. But at this time, that alone is murder which is committed *ex*

malitia præcogitata, 3 Inst. 57. Yelv. 105. for homicide

without malice is no more than manslaughter: And it seems

to me, that where there is a quarrel, there killing shall not

be construed to be murder, if it be a sudden quarrel, and

thereupon the parties contend, and one of them is killed,

but only manslaughter; but if a challenge be sent, there it

shall be said to be murder. 1 Bulst. 87. 3 Bulst. 171. if a

quarrel arise at play, and one kills another, it is but man-

slaughter. 12 Co. 87. So where a man upon the complaint of

his son, went and gave the person who struck his son a mor-

tal stroke, it was held to be only manslaughter. 2 Cro. 296.

HOLT C. J. Whether it be murder or not, depends upon

this question, viz. whether here was a sufficient provocation

or not? And I am of opinion, that the refusal to deliver the

key to the servant sent by *Keate* was not a sufficient provo-

cation. Words are not a provocation: There was a case

tried at the *Old Bailey*, 10 Oâ. 1666. *Grey* a blacksmith

commanded his apprentice to work in his shop, and make

such a thing in his (the masters) absence; at the return of

his master he and his apprentice went to work together at

their trade, and being at work, *Grey* asked his servant whe-

ther he had made the thing ordered to be made by him in his

absence? who answered, that he had not; the master said,

that he would send him to *Bridewell*; the servant replied,

that he chose to be in *Bridewell* rather than in his service;

and upon this the master takes a bar of iron, and with it

gives the apprentice a mortal stroke; and this was adjudged

to be murder.

I have a MSS. written by KELYNCE C. J. of a special ver-

Foster's Cr. Law, 264.

Foster's Cr. Law 257, 262.

Ld. Raym. 1487.

Keil. 126, 127.

1 Hale 472.

Foster 259, 260.

Foster's Cr. Law 259, 262.

Comb. 408.

1 Hale 474.

Keil. 64, 133, 134.

[16]

concerns

De Term. S. Mich. 8 Will. 3.

concerns every *Englisbman* ; and the restraint of such liberty is a provocation to any one that shall see such illegal restraint : But they agreed, that if there had not been a provocation it would have been murder. But KELYNGE, 'T'WISDEN, WINDHAM and MORTON held, that there was not a sufficient provocation, and for that reason that the crime was murder.

As to what had been urged in the present case, that *Keate* was punched with a sled, and retired before such time as he killed his servant ; it is to be understood, that if a man assault another with malice, and afterwards is distressed, and flyeth to a wall, and then kills the other, this is murder : Several persons went into *Hyde-Park* with a resolution to hunt the deer, and to kill all opponents ; the keeper saw the action and commanded them to stand ; thereupon they fled, and the keeper shot after them ; upon which they returned, shot the keeper and killed him ; and this was adjudged murder ; for by the statute *de malefactoribus in parcis*, if a person refuse to stand, upon the demand of the keeper, he may shoot at him : In the present case *Keate* was the master of *Wells* ; and it is objected, that where a master gives a mortal stroke to his servant in the correction of him, it shall not be murder ; as it was held in *Turner's* case ; but that is where a man properly corrects a servant, and gives him by accident a mortal stroke ; for so was *Turner's* case : The servant of *Turner* had refused to do something his master had ordered him ; the master takes up his wife's clogg and struck the servant on the head, of which stroke he died ; this was accidental, and it cannot be imagined that he intended to kill him : But a sword is an improper instrument for correction.

Foster Cr.
L. 273, 277.
Keil, 128,
129.
Maw-
bridge's
case.
1 Hale 479.
480.
Stanf. 15.
Keil. 58,
128.

[17]

In *Holloway's* case, Cro. Car. 131. A park-keeper found a person in the park with a hatchet in order to cut wood, he takes him and ties him to the tail of his horse, and gives the horse two strokes, the horse ran away and killed the person ; this was murder, although the keeper intended only to give him correction for his misdemeanour, but he did it in an unreasonable way ; but if the verdict be uncertain, then there ought to go a *venire facias de novo* ; but to me it seems certain enough. I have heard that the fact was more foul than it is found, and am not for having it tried over again.

ROKEBY

De Term. S. Mich. 8 Will. 3.

ROKEBY and the other Justices gave no opinion; for as ROKEBY said, *De morte hominis nulla est cunctatio longa. Ideo adjornatur.*

Case 9.

Grant of
administra-
tion when
well plead-
ed.

Plowd. 277.

Cro. Eliz.

6, 102, 431,

838, 879,

907.

Cro. Jac.

556.

5 Com. Dig.

202, 207.

2 Bac. Abr.

444.

1 Salk. 38.

40.

3 Lev. 273.

1 Sid. 228.

2 Leon. 155.

2 Bro. Abr. 442.

1 Lutw. 408, 1266.

1 Ld. Ray. 634.

4 Mod. 133.

Cowp. 140.

Dougl. 4. in notes.

Truelock and ———

DEBT. The plaintiff sets forth, that letters of admini-
stration were committed by the official of the Dean,
who had a peculiar lawfully constituted, but does not shew
how he was intitled, as it ought to be done in the case of a
peculiar. Cro. Eliz. 791. Neither doth he say, that the
granting administration *ad tunc pertinuit* to the Dean: And
for these causes the defendant demurred. *Sed non allocatur*;
In as much as the plaintiff has set forth that administration
was granted by the official of the dean, to whom right of
granting administration, &c. belonged, it is sufficient.

Case 10. Barton, Administratrix of William Dolson, and
[18] Fuller. In B. R.

THE plaintiff's declaration was of Michaelmas term the
7th of King William, and sets forth that letters of ad-
ministration were granted 11th of January, 7th of King
William, which is after the action commenced. The Court
said, if administration be granted, and the letters of admi-
nistration are lost, new letters of administration may well be
granted after the action is commenced; but it is otherwise
if they are then originally granted.

If the probate be lost, an exemplification from the ordinary will be sufficient. 1 Strange
440.

Case 11.

Prohibition

to spiritual

Court, when

granted for

fees there.

Stat. 23 Hen.

8. c. 9.

5 Bac. Abr.

Sec. 14.

1 Nelf. 449.

Johnson and Lee. In B. R.

A PROHIBITION was prayed, upon suggestion of the
statute of 23 H. 2. by which it is enacted, that none
be cited out of his diocese: That the plaintiff was resident
at Hungerford in the county of Berks, within the peculiar
jurisdiction of the dean of Sarum, and that the defendant
had

De Term. S. Mich. 8 Will. 3.

had cited him to the Court of Arches for fees expended in the Spiritual Court, which are the customary fees. The defendant shewed, that the dean of *Sarum* requested the dean of the Arches, &c.

NORTHEY argued, that the suit out of the diocese was ill; for the request to the dean of the Arches, upon which the defendant relied, ought to have been made to the next superior, who was the bishop. Hob. 186. 1 Sid. 90. 2 Roll. Rep. 446, 448. Secondly, The suit ought not to have been in the Spiritual Court for fees; for demands *pro opere & labore* are properly determinable at common law; and in this case the law implies a promise in the retainer. If it should be objected, that this Court hath not cognisance of fees in the spiritual Court, by the same reason it may be said, that no action shall be brought here for fees in a court of equity. But the defendant says, that the fees demanded are customary fees due time out of memory; if so it may be proved in evidence; and although suits here are not frequent for proctors fees, yet it makes nothing against us, for suits for them are in general terms, *pro opere & labore*. Vide 2 Roll. Rep. 59. Mod. Rep. 167. where a prohibition was granted for a suit in the Spiritual Court; the like in 27 Car. 2. by HALE C. J. upon a motion.

1 Salk. 303.

1 Salk. 336.

333.

[19]

Cases in B.

R. 608.

Holt 596.

5 Mod. 238.

1 Mod. 167.

Sir BARTH. SHOWER was on the other side; and he said that the dean of *Sarum* had independent jurisdiction, and therefore his request to the dean of the Arches was good. Secondly, Fees are necessary in all suits, and whoever hath cognisance of a suit, may have it of the fees incident thereunto: The Spiritual Court shall always determine incidents; Mar. 45. shall have cognizance of a way to a church, of seats in the church; so if A. is indebted to B. in 5l. and bequeaths so much to B. the Spiritual Court shall determine of both.

HOLT, C. J. A dean, *quatenus* dean, has no jurisdiction; but as he hath a peculiar he is exempt from the ordinary; for that is the import of a peculiar. Then the principal question is, whether a suit in the Spiritual Court shall be brought for fees? It is granted, that a suit may be commenced for them at common law, Fees cannot be settled by the canon law, but they (the Spiritual Court) give costs and expences of suit; but debt doth not lie for such costs at common law.

3 Leon 268.

2 Keb. 615.

3 Keb. 303.

441, 516.

4 Mod. 254.

C

ROKEBY

De Term. S. Mich. 8 Will. 3.

ROKEBY J. cited a case between *Goslin* and *Froggat*, churchwardens of the church of D. in *Staffordshire*, and — in C. B. where at a visitation of the arch-deacon a presentment was made (amongst others) for register's fees, and after several motions a prohibition was granted, and then the matter was compounded.

Case 12.

Lately and Fry. In B. R.

Costs when given upon the statute

22 & 23

Car 2.

Stat. 43.

Eliz. c. 6.

2 Stra. 12.

32.

Gilb. Hist.

C. P. 265.

[20]

TRESPASS *Quare clausum fregit & blada sua ibidem crescen' succidit & asportavit.* The jury, as to the breaking of the close and cutting of the corn in the blade, found the defendant guilty, but as to the carrying away not guilty. **GOULD**, *Serjeant*, moved for full costs, (for the damages given by the jury were no more than 10s. and by the statute 22 & 23 Car. 2. c. 9. the plaintiff shall have no more costs than damages): And it was urged, that this statute was intended for small trespasses, as *pedibus ambulando, &c.* but here the corn is cut down in the blade, which is a great destruction, And,

1 Bac. Abr.

513.

Costs on

malicious

trespasses.

Stat. 8 & 9

Will. 3. c.

11.

Where the

judge at the

trial shall

not find and

certify un-

der his hand

upon the

back of the

record, that

the free-

hold, or title of the land mentioned in the declaration, was chiefly in question; if the jury find damage under forty shillings, the plaintiff shall not recover more costs than the damage; and if more costs be given, the judgment shall be void, &c. and the defendant may have his action for such vexation. Stat. 11 and 12. Wm. 3. ca. 9. 1 Bac. Abr. 512.

ROKEBY J. said, if a man enters my garden and cuts down my trees, for which perhaps the jury gives but small damages, although I suffer a great inconvenience, it would be very mischievous if I should lose my costs. But after several debates the court inclined to be of opinion, that if any thing had been carried away, full costs should have been given; for the carrying away of any cattle is without the act of parliament. Vide 2 Vent. 48. where if a man enters claiming title, there shall be full costs given; but where it doth not appear that the trespass was committed under pretence of title, or that any thing was carried away, there we cannot make a construction contrary to the express words of the act of Parliament.

De Term. S. Mich. 8 Will. 3.

In the HOUSE OF LORDS, the 13th of Case 13.
January, 1697.

Between { Sir Evan Lloyd, Bart. and Mary his Wife,
Sidney Godolphin, and Susan his
Wife, Appellants.
Sir Richard Carew, Bart. and Charles
Tremain, Respondents.

THE case was this: *Rice Tanat*, Esq; was seised of several lands in the counties of *Salop*, *Montgomery* and *Denbigh*, and dying left issue *Mary*, *Penelope* and *Susan*, his daughters and coheirs.

Proviso in a deed for the conveyance of an estate for a certain

sum; if such person die without issue, held good, notwithstanding a fine levied by them, where the uses were declared otherwise.

By lease and release of the 24th and 25th of July 1674, upon the marriage of *Penelope* with Sir *Richard Carew*, in consideration of 4000*l.* paid by him to *Mary*, they the said *Mary* and *Penelope* convey two parts of the lands aforesaid to trustees, in trust for Sir *Richard Carew*, for life, and afterwards for *Penelope* for life, and afterwards to the issue of their two bodies, &c. remainder to Sir *Richard Carew* and his heirs; with a proviso, that if it should happen that no issue of the said Sir *Richard Carew*, on the body of the said *Penelope*, should be living at the decease of the survivor of them, the said Sir *Richard Carew* and *Penelope*, and the heirs of *Penelope*, should, within twelve months after the decease of Sir *Richard Carew* and *Penelope* without issue as aforesaid, pay to the heirs or assigns of the said Sir *Richard Carew* 4000*l.* then the remainders and trusts for the said Sir *Richard Carew* and his heirs should cease and be void, and the fee-simple of the said premisses should be to the right heirs of the said *Penelope* for ever. *Mary* afterwards was married to Sir *Evan Lloyd*, and *Susan* to *Sidney Godolphin*.

[21]

Sir *Richard Carew* and *Penelope* his wife levy a fine of the land in com' *Salop* to the use of Sir *Richard* and his heirs, and afterwards die without issue; and the appellants, as heirs of *Penelope*, exhibited their bill in Chancery against *Charles Tremain* the surviving trustee, and Sir *Richard Carew*,

De Term. S. Mich. 8 Will. 3.

Carew, devisee of Sir *Richard* the husband of *Penelope*, to have a conveyance of the premises to them and their heirs, upon payment of 4000l. pursuant to the proviso. But the bill was dismissed by the Lord Chancellor *SOMMERS* 6 Nov. 1697, under pretence that this proviso tended to a perpetuity.

And now upon the appeal to the Lords the decree for the dismissal was reversed, after hearing of the judges and a long argument; and afterwards by order 24 Mar. it was added to the decretal order, That on payment of 4000l. to Sir *Rich. Carew*, or into the court of Chancery for his issue, the appellants, as heirs of *Penelope*, should be let into possession of the premises in question.

Term. Sanct. Hill.

8 Will. 3. In B. R.

Gale and Ewer.

Case 14.

A PROHIBITION was moved for to the Consistory Court of London, where *Ewer* the rector of *Ingatestone* libelled for refusing to set out tithes, or if they were set out, such setting out or severance was in the absence of, and without giving notice to the rector, and also that the plaintiff after severance, without notice to the rector, took the nine parts, and turned his cattle into the meadows where the tithes were, who destroyed and consumed the tithes: And upon a suggestion, that by the statute 2 Ed. 6. cap. 13. All the King's subjects ought justly to set out their tithes, &c. and that the plaintiff had separated them from the other nine parts; and whereas the exposition of all statutes belongeth to the temporal judges; and whereas tithes divided from the nine parts are lay chattels, and a suit for trespass, &c. is merely temporal, &c. this motion was made.

And first it was urged, that the spiritual court ought not to proceed for refusing to set out tithes, but for the subtraction of them only: For by the statute 2 Ed. 6. c. 13. it is enacted, that if any person do subtract or withdraw any manner of tithes, &c. the party so subtracting or withdrawing the same may or shall be convented or sued in the King's Ecclesiastical Court, &c. And the clause which gives the suit in the Spiritual Court for the double value says, If any person carry away his corn before the tithe thereof set forth, &c. so that the suit in the Spiritual Court ought to be for the subtraction only, and not for refusing to set the tithe out: The clause which provides, that all the King's subjects shall duly set out their tithes, gives the penalty of treble value; but the remedy is by action of debt in the temporal courts. This clause for the setting out of tithes is introductive of a new law; as it appears by Co. 2 Inst. 649. and by consequence the exposition thereof appertaineth to the temporal courts, which ought to judge whether the tithes were duly and without fraud

Turning of cattle into tithe makes it a fraudulent severance.
5 Bac. abr. 95, 97.
(A 2.)
Bunb. 333.

Noy 44.
2 Bull. 184.
Cro. Eliz. 607, 844.
2 Rol. Ab. 286.
2 Inst. 613.
Moor 912.
Godb. 234.
Carth. 70.
Litch. 125.
3 Bull. 241.
Palmer 380.
[23]
5 Bac. Ab. 93.
Ld. Raym. 188.
Stra. 246.
3 Bur. 1873.
192.
4 Bur. 295.

De Term. S. Hill. 8 Will. 3.

fraud severed and divided ; for the manner of tithing ought not to be governed by the canon or civil law.

A prohibition was granted Trin. 1 W. & M. upon a suggestion, that tithes were set out. 2 Vent. 48. But in the present case the court did not incline to do so ; for the clause which gives double value for carrying away corn, &c. before tithes set out, gives the spiritual court cognizance for refusing to set out tithes. 2 Roll. Abr. 299. l. 15.

5 Bac. Ab.
95.

2dly, It was urged, that the Spiritual Court ought not to proceed for the setting out of tithes without notice given to the rector ; for although the ecclesiastical law requires notice to the parson when the tithes are severed, yet the common law requires no such thing ; as HUTTON saith it has been adjudged. Noy 19. The statute 2 Ed. 6. c. 1. says only, it shall be lawful for every party to whom any of the said tithes ought to be paid, &c. to view and see the said tithes to be justly and truly set forth, and the same quietly to take and carry away, &c. and altho' it be that as to the taking and carrying, this statute is declaratory, yet as to the view, it is introductory of a new law ; as it appears 2 Inst. 650. And the penning of this act is, That it shall be lawful to view, &c. which shews the intent of the legislature was not, that the parishioners should give notice thereof ; and that no notice is necessary hath been oftentimes adjudged : Thus 13 Car. 1. between *Chase* and *Ware*, in this Court, and afterwards affirmed in error. Style 342. 1 Rol. Abr. 643. l. 30. So also Trin. 1 W. & M. 2 Vent. 48.

[24] And of the same opinion was the court in the present case ; and a prohibition was granted as to the suit for not giving notice of setting out the tithe. It was urged on the other side, that this matter ought to have been pleaded in the Spiritual Court. But,

HOLT, C. J. answered to that, there was no necessity that it should be so pleaded ; forasmuch as it appears upon the face of the libel, that the suit was for setting out tithes without giving notice ; it would have been otherwise if the suit had been for refusing to set out tithes.

The plea, that the tithes were severed, is no good cause for a prohibition ; unless they refuse that plea for want of notice given of the severance. But,

HOLT, C. J. thought the turning of cattle to the tithe made it a fraudulent severance, and that a suit might be maintained for it in the spiritual court.

The

AN *Habeas Corpus* was brought for the defendant, who was committed for his refusal to come upon the livery in the Vintners Company of London. The custom was returned, that if any member refuse to take the livery, &c. the Court of Assistants might commit him to the officers of the city; that Clerk refused, and was committed to the keeper of Newgate, but it was not said, that he was an officer of the city; and for this cause the return was ill: For the return ought to shew that the custom was pursued; and the best pursuit is for the court judicially to commit him to the sheriffs, who are the officers of the city; therefore the defendant was discharged. But the court held the custom to be good; and they thought, that as there was mention of a warrant in writing, such warrant ought to be returned *in hæc verba*.

12 Co. 130, 131. 1 Lord Raymond, 99, 153. S. C. 5 Mod. 308. Mod. Cases, 75. Comb. 309. S. C. Holt, 94, 334, 335. 1 Salk. 349, 350, 351. 1 Lord Raym. 586. S. C. Carth. 291. Comb. 294. Skin. 269. 2 Lord Raymond, 851. 2 Will. 154, &c. Doug. 159. For an explanation of the different sorts of certainty; see Cowp. 672, 682.

A custom to commit for refusing to come upon the livery in the Vintners Company held good, For the certainty and sufficiency of returns on Habeas Corpus, see Vaugh. 137. 3 Bac. abr. 11, 12. 1 Hal. hist. P. C. 584. Skin 676.

ACTION UPON THE CASE brought against a hackney-coachman; and the plaintiff declared upon the custom of the realm as against a common carrier. The case upon evidence appeared to be this: A person had taken the hackney-coach, and had delivered his goods to the coachman to be carried with him, but in the passage the goods were lost; and whether the coachman should be charged for them without an express contract was the question. And by,

HOLT, C. J. at a trial at Guild-Hall, it was held, that a passenger shall not charge a hackney-coachman for goods which he carries with him, if he does not give any thing for the carriage of them; but if he pays for the carriage, then he may charge the carrier; and in the present case there was no express contract for the carriage, but by the custom and usage of stages every passenger uses to pay for the carriage of goods above such a weight, there the coachman shall be charged for the loss of goods above such a weight.

A hackney coachman not a carrier, to be charged upon the custom of the realm.

1 Salk. 282. 1 Mod. 198. 3 Mod. 313. 3 Lev. 258. 1 Danv. 3. 2 Saund. 115. 2 Salk. 440, 441, 444. 63, 614. 4 Leon. 23. 1 Show. 29. Hob. 206. Palm. 534. 2 Cro. 202. Mutt. 121. Skin. 625. S. C. Hoff 130. 2 Show. 128

Anonymous.

Case 17.

†Anonymus. In B. R.

Where
scandalous
words are
spoken of
the function
of a spiri-
tual person,
a prohibi-
tion shall
not be

A PROHIBITION was prayed to the Spiritual Court, where the dean of — had libelled for these words, as *You are a knave, a knave, a knave indeed.* 2 Rol. 297. Godb. 447. And it was urged by SELBY for a consultation, that these words of a spiritual person are defamatory, and a libel may be maintained in the Spiritual Court for them; and he cited 2 Vent. 2, and a case there cited, where a prohibition was denied for these words, *Sir Priest you are a knave. Sed non allocatur*; for by

Cro. Car.
502.
Far. 1.
2 Salk. 692.
693.
2 Lev. 49,
63, 66.
3 Lev. 17, 119, 137, 350.

HOLT C. J. where the words are spoken of the function of a spiritual person, or charge him with falsity in that function, a prohibition lies not; but for these words, where there is no relation to the function, a prohibition shall go; and after several debates it was granted.

† Salkeld, 548. calls this Hawkins' Case.

Termino Paschæ.

9 Will. III. In B. R.

Bennett and Thalbois.

Case 18.

TRESPASS *Quare clausum fregit nec non venatus est, &c.* existente inferiore artifice, Anglice an inferior tradesman, scilicet pannario, Anglice a clothier; & alia enormia, &c. to the damage of the plaintiff, &c. *ac contra formam statuti, &c.* And after a verdict for the plaintiff, and two-pence damages, it was moved in arrest of judgment for preventing of costs, that the plaintiff had founded his action upon the statute, but had not pursued the statute; for it is said that the plaintiff being a clothier *venatus est*, but a clothier is one of the principal tradesmen of the kingdom, and cannot be comprehended within the words *inferiour tradesman*. *Sed non allocatur*; for the statute seems to prohibit all trades; but if this case were without the statute, yet an action lies against the defendant at common law; and the words *contra formam statuti* shall be rejected; as In the case between *Ward and Rich*, in an action brought for taking away a man's wife, and detaining her *quousque, &c.* the plaintiff concluded *contra formam statuti*, which words were rejected, for there was no statute in the case, 1 Vent. 103. So in an indictment against three, it was set forth that one, stabbed, &c. and the others were present and assisting, and the conclusion was *contra formam statuti*, where one only was within the statute, and the others indictable at common law; and it was held that the words *contra formam statuti* should be restrained to one, and should not be extended to the others. And although it was objected that in the present case there was a statute *contra venantes*, upon which this action is founded; and therefore it came not within the reason of the first case where there was no statute; and that this action was founded upon a statute, but the statute was misrecited, which made the case different from that of an indictment, where the statute of stabbing was well recited; and so the words *contra formam statuti* properly

Where an action lies against the defendant at common law, the words *contra formam statuti* in the declaration, shall be rejected as surplusage.
1 Ld. Raymond, 149, S. C.
Carth. 382. S. C.
5 Mod. 307. Comb. 420. S. C.
[27]
Cases B. R. 121.
Holt 661.
Plowd. 63.

restrainable

De Term. Pasch. 9 Will. 3.

reſtrainable from it ; yet judgment was given for the plain-
tiff *per totam curiam*.

1 Salk. 212. calls this caſe Bennet and Talbot.

Cafe 19. The King, and Thorpe and others. In B. R.

INFORMATION that the defendants *malicioſe, &c. pro-*
curarunt filium & heredem *decedere de domo*
patris ſui, and then *perſuaſerunt compulſerunt & procurave-*
runt him to be made drunk, and ſo inveigled him to mar-
riage, &c.

NORTHEY argued that no ſuch information lieth, for
a father hath no action againſt a perſon for perſuading
his ſon to marry. Cro. Eliz. 55. 1 Leon. 50. And mar-
riage is an honourable ſtate, and for that reaſon it is no
offence to perſuade any one to enter into it ; ſo it is no of-
fence to the King to perſuade the ſon of any perſon to de-
part from his father, without a ſpecial allegation in what
manner, and an information never was maintained before
for a matter of ſuch a nature.

Inveigle-
ment to
marriage.
Cro. Car.
38. b.
Cro. Eliz.
770.
F.N.B. 260.
Moor 736.
Plowd. 267.
Raym. 259,
260.
3 Bl. Com.
140.
3 Will. 18.
3 Bn. 1879.
2 Term.
Rep. 166.

WRIGHT, Serjeant, *contra*. Here is a great offence ; for
if a man hath his ſon and heir inveigled into a marriage
with a woman of ill fame, by ſuch wrongful ways his family
is ruined without poſſibility of reparation.

An action
will not lie
by the fa-
ther for de-
bauching
his daugh-
ter.
2 Ld. Raym.
1032.
But it will
lie for the
loſs of her
ſervice.
Sec ſtat. 12.
Car. 2. c.
24. by
which the
valor ma i-
telligit is al-
lowed.

And afterwards in Mich. term, 9 W. 3. it was argued by
WILLIAMS of *Grays Inn*, that an information lay not ; for
the information ſuppoſeth that the infant married was under
the age of eighteen years ; and yet is poſſible he may be
above the age of fourteen years, which is the age of diſ-
cretion, at which a man may contract marriage ; or perhaps
he may be under the age of fourteen years. If it be intend-
ed that the infant was above that age, then he is enabled to
contract matrimony, and it is lawful for him to do it ; ſo
then to perſuade him to that which it is lawful for him to do,
is no offence ; the acceſſary cannot be guilty where the
principal is innocent ; and this cannot be by reaſon of the
law of nature, that the ſon is under ward of the father ;
for if it were ſo, the younger ſon would be alſo under his
ward. But the father can have no action but only *Quart*
ſilium & heredem rapuit ; but this is by our law which gives
the guardianship until the age of fourteen years ; and if the
heir was under the age of fourteen years, then the marriage
is voidable, and ſo no prejudice.

[28]

DARNAL,

De Term. Pasch. 9 Will. 3.

DARNAL, serjeant, on the other side insisted, that the father shall have the guardianship of the son until the age of twenty-one by the law of nature; and that such an inveiglement is an offence although the father had not his action for it, &c.

HOLT, C. J. told WILLIAMS that his last point destroyed the foundation of his first; for in the first he urged that the son at the age of fourteen years had power to contract marriage, and for that reason the persuading him to do it, was no offence; and in the second, that such persuading is not an offence under the age of fourteen years for that he hath then no power to contract; but he said that marriage under the age of fourteen years is good if it is not disagreed unto. And HOLT said that the father is guardian to the son until the age of twenty-one years by our law which is founded upon the law of nature; but our law gives remedy only in the case of an eldest son, by reason that it makes provision only for him.

DE

Term. Sanct. Trin.

9 Will. III. In B. R.

Case 20. Jones *and* Mosely. Tr. 4 Jac. 2. rot. 176.
By the name of Jones *and* Morley.

Deeds to
lead the
uses of
fines.
1 Ld. Ray.
287.
2 Salk. 677.

[30] UPON A SPECIAL VERDICT the case was to this effect: Baron and feme seised in fee in right of the feme, by indenture dated 29 Jan. covenant to levy a fine of the lands of the feme within Hillary term next ensuing; and afterwards by another indenture dated the 31st day of January, between the baron of the one part and the feme of the other, it was covenanted, concluded and agreed, that all former contracts, covenants and agreements between them should be void, until such monies according to their marriage settlement should be paid, and then should stand of force. The fine was acknowledged before the 29th of January, and passed the King's silver the same Hillary term, but after the 31st of January; and whether this fine should enure to the uses limited by the deed of the 29th of January, or not, was the question in this case between the heir of the baron and the heir of the feme? And it was argued by BANNISTER for the plaintiff, and Sir BARTH. SHOWER, for the defendant. And after argument HOLT C. J. seemed of opinion, that this deed between the baron and feme was a void deed; for (says he) it was of no effect to bind the baron, by reason that he cannot covenant with his wife; but if there were no other deed upon which the uses of the fine might arise, this might have been sufficient for declaring the uses of the fine; but here is another deed dated the 29th of January which does declare the uses: True it is, that this fine varies in the circumstance of time, for it is said in the indenture of the 29th of January, that the fine shall be levied in Hillary term next, and the fine was really levied of Hillary term then present; for that indenture is dated within Hillary term; and although a fine cannot be averred to other uses than those which are expressed in an indenture precedent to declare the uses, (otherwise if the indenture

De Term. S. Trin. 9 Will. 3.

indenture be subsequent, 9 Co. Downham's case,) yet if Fitz. Affize,
the fine vary in any circumstance of time, place, or ^{334.}
quantity of acres, it might, before the statute 29 Car. 2. ^{9 Co. 9, 10.}
p. 3. be averred to other uses; or if there were two ^{Cro. Jac.}
deeds to declare the uses of a fine after levied; the last deed ^{912.}
shall be that upon which the uses shall arise; then it is to
be considered, whether the deed of the 31st of January can
avert the uses of this fine? And I think it cannot. *Vide post*
Jones and Mosely.

D E

Term. Sanct. Mich.

9 Will. III. In B. R.

Case 21.

Anonymous.

The benefit
of a judg-
ment a-
gainst hus-
band and
wife shall
survive to
the plaintiff.

THE case was this: A feme sole recovered and had judgment in debt upon a bond, and afterwards married; and the husband and wife sue out a *scire facias* upon this judgment, and have execution awarded; but before execution had, the baron dies, and his executors sue out execution.

Sir BARTH. SHOWER urged, that the *scire facias* brought by the executor of the baron lieth not, for the debt was not vested in the husband by the award of execution on the *scire facias* brought by him and his wife. If a man takes a wife to whom J. S. is bound in an obligation, and the husband and wife sue the obligor and get judgment, and the wife dies, the debt is vested in the husband; for that, which was before a chose in action, *transit in rem judicatam*, &c. and is of another nature from what it was before the coverture; but a chose in action shall never vest in the husband by the coverture, if he does not gain the actual possession of it, or at least alters it so that it be no longer a chose in action: And it is for this reason that, where husband and wife have judgment upon a bond made to the wife *dum sola*, the chose in action is altered, and no action lieth afterwards upon the bond, but debt must be brought upon the judgment; but where husband and wife have execution awarded in *scire facias* upon a judgment, they may afterwards bring debt upon the same judgment, but they never can have debt on the judgment in *scire facias* the *scire facias* is no more than a writ of execution; for at common law, if the plaintiff did not sue out execution within the year, he could not do it afterwards, but ought to bring his action of debt upon the judgment. And therefore the statute of Westminster 2 cap. 18. gives the *scire facias*, which is but a writ to have execution after the year, if the party had nothing to say to the contrary; and for this reason, if execution be awarded in the *scire facias*, it does not alter the

nature

nature of the thing upon which the *scire facias* is brought ; if a *scire facias* is brought upon a recognizance, and execution is awarded, there may be another *scire facias* upon the same recognizance. And this case is different from that between *Obrian* and *Thomas*, adjudged in B. R.

There a *scire facias* was brought against the husband and wife upon a judgment against the wife *dum sola*, and execution awarded against them ; and afterwards the wife died, and the husband remained charged, for the words were *quod habeat executionem versus eos*. But

HOLT, C. J. said that he did not see any difference, for that judgment in the *scire facias* was against husband and wife for a debt owing by the wife, and upon the death of the wife the charge survived to the husband. And so in the present case, as the husband and wife have judgment in *scire facias* for a debt due to the wife, the benefit thereof survives to the husband, for the judgment is joint, and for that reason it shall survive ; if the husband outlives the wife, he shall have the benefit of it ; if the wife outlives the husband, she shall have the same benefit.

ROKEBY, J. doubted, because the nature of the debt in the present case is not altered.

Turberville and Stamp. In B. R.

Case 22.

Where an action of the case lies for negligently keeping his fire in his close, by which the plaintiff was damaged.

AN action of the case, founded upon the general custom of the realm, against the defendant, for negligently keeping his fire ; and the plaintiff declared that the defendant in his close did light up a fire to burn the stubble, & *ignem suum tam improvide & negligenter custodivit quod pro defectu debite custodie ignis sui præd* the clothes of the plaintiff in the close adjoining were burnt.

After a verdict for the plaintiff, GOULD serjeant moved in arrest of judgment, for that this action lay not, neither for the matter of it, nor for the manner ; for an action lieth not on account of a fire lighted up in a close, but only for fire in a house, for there a man must take care of his fire at his own peril, and it may properly be said to be his own fire, but out of his house it cannot be said to be his fire, and where it is not his fire an action will not lie, as it seems 2 H. 4. 18. a. But if an action would lie for the matter, yet in the present case it is ill brought, for the plaintiff ought to have declared that the defendant *exarsit* vel

[33]

De Term. S. Mich. 9 Will. 3.

vel ardebat his clothes, and not to have declared upon the general custom of the realm.

NORTHEY contra : An action lieth as well where the fire is lighted in the close as in the house of the defendant ; an action was maintained lately for fire in the woodstack of the defendant ; and then the declaration is well enough, for the plaintiff says that by the improvident keeping of the fire the clothes of the plaintiff were burnt, which is now found by the verdict.

HOLT, C. J. the only question is, Whether the plaintiff ought not to have shewn a special negligence in the defendant.

The case was afterwards adjudged in favour of the plaintiff by the whole court ; for the action is as well for a fire kindled in the fields of the defendant as in his house, for it is the defendant's fire and kindled in his ground, and he ought to have the same care of a fire which he kindles in his field as of that which is made in his house, for the duty to take care of both is founded upon this maxim, *sic utere tuo ut non lēdas alienum* ; but if the fire of the defendant by inevitable accident, by impetuous and sudden winds, and without the negligence of the defendant or his servants, (for whom he ought to be answerable) did set fire to the clothes of the plaintiff in his ground adjoining ; the defendant shall have the advantage of this in evidence, and ought to be found Not guilty. But here the verdict hath found negligence in the defendant. Therefore judgment for the plaintiff. †

Skia. 681. Cas. B. R. 151. Holt 9. † See the record, 1 Salk. 724.

[34]

Sutton and Moody. In B. R.

Cafe 23.

When a person may be said to have a property in what is called Fera Naturæ.

V. de 7 Co.

17 b.

Keb. 39.

4 Leon. cas.

261.

2 Leon. 36.

11 Co. 82.

TRESPASS *Quare clausum fregit & in clauso suo præd' venatus fuit & cuniculos suos ibidem invent' cepit & asportavit, &c.*

After a verdict for the plaintiff, it was moved in arrest of judgment by Serjeant GOULD, for that the declaration was ill, for there it was said *cuniculos suos*, whereas a man cannot have a property in conies ; *sed non allocatur* ; for by,

HOLT, C. J. He hath a property in them whilst they are in his own ground. If a man start a hare in his own ground and course it to the close of another person, and there takes it, the hare belongs to the owner of the ground where

De Term. S. Mich. 9 Will. 3

where it was first started; but if it was started in the close of another man and there killed, it is the hare of the owner of the close where it was killed; but if the hare starts in another man's ground and is coursed out of it, it is the hare of the captor, for the property rests in the owner of the soil, *ratione loci*; but if she runs beyond his (the captor's) ground (being *feræ naturæ*) he loseth his property; thus during the time they are in his soil the plaintiff may call them his conies; and it is the same thing where conies are in a warren or deer in a park, as where they are in a man's field or close; for warrens and parks are privileges, but do not give any property. In the present case the plaintiff declares, *Quare clausum fregit & cuniculos suos ibidem invent,* &c. which shews the conies to have been in his close at the time of the taking; but if he had brought trespass generally *quare vi et armis sex cuniculos cepit*, he could not say *suos*, and so it is agreed 22 H. 6. 59. b. Judgment was given for the plaintiff.

2 Black. Com. 390. A man cannot have property in them, except on a special account as having warren.
1 Cro. 553. F.N.B. 87. Reg. 93. b. 1 Browal. 167. But he has property in them, if killed in his own ground.
1 Co. 17 b. 2 Salk. 559. 637, 667. Cro. Car. 608. Godb.

553. Comb. 458, f. c. 5 Mod. 375. f. c. Caf. B. R. 144, 145. Holt. 608. Godb. 174. 12 H. 8, 9. 3 Salk. 290.

Smalcomb and Owen Buckingham and Sir Edward [35]
Mills, Sheriffs of London, and Crofs. In B. R. Case 24.

THE case was this. *Crofs* had a judgment and took out execution thereon by a *feri facias* against one *Fox*, and delivered the writ of *feri facias* to the sheriffs, but did not ask for a warrant upon it, nor desire it to be executed, but only left it with the [under] sheriff at his office; *Smalcomb* the plaintiff also took out a *feri facias* upon a judgment which he had obtained against *Fox*, and it was delivered to the sheriffs on the same day, but after the delivery of the other *feri facias* to them by *Crofs*; and *Smalcomb* demanded execution of his writ, which was accordingly done for him; and the sheriffs made sale of the goods and chattels of *Fox* for the debt due to *Smalcomb*; and afterwards *Crofs* and the sheriffs took the same goods in execution upon that *feri facias* which was first delivered; whereupon *Smalcomb* brought an action of trover for them.

It was urged for the defendant's at the trial, that the first writ bound the goods, and that they could not be taken in execution by the plaintiff upon his *feri facias*, which was first delivered. And,

D

HOLT,

There may be an execution of goods after a first *feri facias* that has not been executed.
5 Mod. 376. 1 Salk. 320. f. c. Carth. 419. f. c. 1 Ld. Ray. 251, f. c. 3 Cro. 174. 1 Sid. 271. Mo. 202. Moor 402. 2 Ld. Ray. 1072. Cro. Eliz. 391. Cro. Car. 459, 487. Mod. Caf. 292. 5 Mod. 576.

Comb. 428. HOLT, C. J. being in doubt upon this matter at the
 3^d alk 159. trial, ordered that the court should be moved upon it. And
 Holt 302. now it was argued for the defendants, that at common law
 Cases B R. the goods were tied down by the *teste* of the *fieri facias*.
 146. Cro. Eliz. 174. And if a *fieri facias* was taken out one
 A *fieri fa-* day, and another *fieri facias* the next day, and the sheriff
 c. a. may be executed on goods bona fide sold after the award of the writ.
 Cro. E iz. 181, 440. delivered should have the preference. And notwithstanding
 8 Co. 171. that at common law, if two writs of *fieri facias* bear *teste*
 Cro. Jac. the same day, that which is first delivered and executed
 451. ought to stand; for it cannot be decided which issued first,
 Gilb. Ex. 13. for the priority ought to be tried by the record, which
 6 Mod. 225. makes no distinction between writs that have the same *teste*;
 2 Stran. yet as it is enacted, by that statute, That a *fieri facias*, or other
 751. writ of execution, shall bind the property of goods from
 1 B c. Abr. the time of delivery to the sheriff, &c. and by consequence
 262. the time of the lien made subject to another manner of
 1 Term trial, (for this is matter of fact, and shall be tried by jury,
 Rep. 770. [36] and may be proved) the time of the delivery is become the
 In defendant *terminus* from which the goods are bound; and the first de-
 lie after fi- livery of a writ will so bind the goods, that they can never
 fa. award- be sold by a *fieri facias* delivered afterwards; and altho'
 e', the goods may be taken in the hands of his execu-
 tor; and the officer shall not be affected by a sale re-
 turn.
 Cro. E iz. 174, 181. *fieri facias* &c. shall bind from the day, but from the time of
 12 Mod. delivery; and the case in 1 Sid. 271. was cited, where a
 170. *fieri facias* bore *teste* the 4th of July, the defendant became
 2 Vent. 218. a bankrupt on the 6th of July; and in trover it was found
 1 Roll Abr. by the verdict, that the writ was purchased on the 11th of
 897. July; yet it was adjudged, that the goods should become
 2 Roll Abr. liable from the *teste* of the writ, which was on the 4th of
 561. July.

But on another day judgment in the present case was given for the plaintiff by the whole court. And,

HOLT,

1 Leon. 144.
 1 M d. 188.
 Cro. Car.
 149, 417.
 8 Co. 171.
 Cro. Jac. 451.
 Rep. 361, 729.
 Ld. Raym. 695, 808, 850, 1073. 3 P. Will. 399. 1 Term

De Term. S. Mich. 9 Will. 3.

HOLT, C. J. declared their reason to be, for that at common law, if there were two writs of *feri facias* the one bearing *teste* on such a day, and the other on the next day, and the last writ was first executed, such execution should not be avoided, and the party had no remedy but against the sheriff; for the sheriff ought to make execution at his peril, and the sheriff shall be excused if there was no default in him; as if he who took the first writ out conceals it in his hand, the sheriff may rightly make execution on another writ which bears the last *teste*, but came first to his hands. And it hath been held, that if a recognizance be extended, the execu or ought to satisfy that before a judgment which is not prosecuted; and therefore in the present case, as he who first brought his *feri facias* to the sheriffs did not desire that it might be executed, the sheriffs might rightly execute the last *feri facias*, and such execution shall not be avoided. Judgment for the plaintiff.

By stat. 29
Car. 2. c. 9.
no writ of
execution
shall bind
the property
but from
time of de-
livery to the
sheriff.
5 Mod. 377.
1 Salk. 320.
[37]
Skin. 257.
2 Mod. 310.
2 Vent. 218.
1 Bur. 271.

Winter and Loveday. In B. R.

Case 25.

IN EJECTMENT, upon a special verdict, the case appeared to be as follows: *George Pawlett*, seised of the manor of G. and other lands in fee, upon the marriage of his son *Edward* conveys the premises to the use of himself for life, afterwards to the use of *Elizabeth* the wife of his son for life, then to the use of *Edward* the son in tail, then to the use of himself in fee; in which settlement there was the following proviso, viz. "Provided always, and it is the true intent and meaning of all the parties to these presents, that the said *George* during his life, and after that the said *Elizabeth* during her life, may make leases, &c. if in possession, for one, two or three lives, or for the term of thirty years, or for any other number or term of years determinable upon one, two or three lives, or in reversion for one or two lives, or for the term of thirty years, or for any other number or term of years determinable upon one or two lives: so as the said leases be not made of such part of the said manor of G. as are the demesne lands of the said manor, and so as the ancient rent be reserved, &c." And it was found, that the said *George* made a lease (under which the defendant claimed) of the lands mentioned in the declaration, which were parcel of the lands held of the said manor by copy according to the custom; to hold after the

Power to
make leases
when well
pursued.
5 Mod. 378.
1 L. Ray.
267.
2 Salk. 537.
2 Roll. 51.
6 Ent. 590.
No. 9.
1 Brownl.
184, 185.
2 Brownl.
53.
Winch. 91,
92.
Hob. 175.
Lutw. 1464.
4 Mod. 265.
1 Mod. 318.
6 Co. 33.
8 Co. 70.
4 Co. 70.
5 Mod. 244.
245, 378.
Vide 6
Mod. 20.
Cal B. R.
147.
Holt 414.
Post. 315.

expiration of a former lease determinable upon three lives, for the term of thirty years absolutely: And if the lease be warranted by the power, then the jury find for the defendant, otherwise for the plaintiff. After argument at the bar, it was now upon a solemn argument adjudged for the plaintiff. The whole Court agreeing, that the lease was not warranted by the power, but they differed in the reasons and grounds for their opinion: For by,

[38]

HOLT, C. J. TURTON and EYRE, it was held, that the lease for thirty years absolutely was good within the proviso; for the words of the proviso are, For one or two lives, or for the term of thirty years, or for any other number or term of years determinable on one or two lives, &c. where the repetition of the particle (for) disjoins and separates the sentence and makes so many distinct clauses, so that *George Pawlett* had power to make leases either for one or two lives, or for thirty years, or for any number of years determinable on one or two lives; he had his election to make the one lease or the other; if he could not lease but for thirty years determinable on two lives, the preposition (for) in the clause (for the term of thirty years) would govern the whole sentence, which would have been penned in this manner, viz. For the term of thirty years, or any number of years determinable, &c. or rather, for any term or number of years determinable on one or two lives; for if such a construction were to be made, what occasion would there be for these words, (for the term of thirty years?) they might be intirely omitted; but as the sentence runs, For the term of thirty years, or for any other number or term of years, such repetition or reiteration makes them distinct clauses; and as the first (for) governs the first clause, For the term of thirty years, so the last preposition (for) governs the latter clause, for any term or number of years determinable, &c. and explains the intent of the parties to be, that *George Pawlett* might make leases for any number of years determinable on lives, so in like manner for thirty years absolute: And to prove this difference the Chief Justice cited two authorities; the first was 6 Co. 39. *Finch's case*; where dame *Katharine Finch* granted an annual rent of 20l. issuing out of the manor of *Eastwell*, &c. & *messuagiis, terris, &c. dictæ Katharine, situat' &c. in parochiis de Eastwell & C.* in the county of *Kent*, or elsewhere in the same county, to the said manors or any of them belonging; and the question was, whether

De Term. S. Mich. 9 Will. 3.

whether the other lands of the said *Katherine Finch* which were in the county of *Kent*, and did not appertain to the said manor, should be charged with this rent? And resolved that they should not; for the words (*aut alibi*) do not enlarge the lands charged with the rent, but only enlarge the [39] vills in which the lands before charged did extend; but if ^{2 Roll Rep. 261.} the grant had run, *aut de terris alibi in eodem com'* there the iteration of the words *lands and tenements* would have enlarged the lands and tenements out of which the rent was to have issued. The second was, where the King granted the manor of S. *nec non omnes terras & tenementa sua in S. nec non omnes terras & tenementa sua dicto manerio de S. pertinent'*; the manor of N. which was in S. but not part of the manor of S. passed. ^{Winch. 90, 92. Hob. 175. Litt. Rep. 208.} 1 Leon. 119. And,

HOLT, C. J. explained what was the nature of a lease in reversion thus; In the most ample sense, that is said to be a lease in reversion which hath its commencement at a future day, and then it is opposed to a lease in possession; for every lease, that is not a lease in possession, in this sense is said to be a lease in reversion. But this is not the notion of a lease in the present case; if it were, then *George Pawlett* might have made leases to commence forty years afterwards; but a power ought to be taken strictly: And where any one is enabled to make leases generally, this impowers him to lease only in possession. ^{2 Cro. 34. Yelv. 222.} So where mention is made of leases in reversion in a power, this shall be intended of leases to commence after the end of a present interest in being; which is the second notion of a lease in reversion. But here a power is given to make leases for one or two lives in reversion, and to make leases for years; but a lease for life cannot be made to commence at a future day; and for that reason the very same expression (lease in reversion) will have a different signification in the same conveyance; being applied to a lease for life, it shall be intended of a concurrent lease, or a lease of the reversion, viz. a lease of that land which is at the same time under a demise; and then it is not to commence after the end of the demise, but hath a present commencement, and is concurrent with the prior demise; but being applied to a lease for years, it shall be intended of a lease which shall take its effect after the expiration or determination of a lease in being. And,

HOLT, C. J. added farther, that he thought that if a power enabled any one to make leases in reversion as well

[40]

as in possession, he cannot make a lease in possession, and another lease in reversion of the same land; but his power to make leases in reversion shall be confined to such land as was not then in possession: But in the case in dispute, it is not found whether the customary land, of which the lease in reversion was made for thirty years, was in possession at the time of this marriage settlement. But notwithstanding that the three judges were of opinion, that the power was well pursued by a lease of thirty years absolutely; yet they held, that this power did not warrant a lease of copyhold lands held of the manor; for the qualifications of this power are, "So as such leases be not made of such part of the said manor of G. as are the demesne lands of the said manor, and so as the ancient rent be reserved";

but customary lands are part of the demesnes of a manor, and the pleading is, that the lord is seised of a manor *in dominico suo ut de feodo*. A manor consists of demesnes and services, and upon the grant of a manor the tenants ought to attorn for their services; but copyholders have no occasion to make an attornment; for their tenements pass by the grant as parcel of the demesnes. Litt. Sect. 556. and Co. Li. *ibid.* 311. b. And if a common person grants all the demesne lands of a manor, the copyhold tenements held of the manor pass; for they are parcel of the demesnes of a manor. 1 Co. 46. b. *Alton Woods*.

But it was objected from the bar, that if customary tenements are parcel of the demesnes of a manor, then here is nothing that could have been demised, and yet it was intended that *George Pewett* should have power to make leases of so much of the manor as was not the demesnes.

To which it was answered by *TURTON* and *EYRE*, that there are other lands mentioned in the conveyance to which the power to make leases may extend. But, *HOLT*, C. J. thought that this was not a full answer; because it appears to be the intent of the settlement, that part of the manor may be demised; and was of opinion, that the rents and services may be demised within this power: And notwithstanding that the other qualification annexed to the power says, that the ancient rent shall be reserved; and no reservation of a rent can be upon a lease of rents and services, out of which no rent issues, yet the rents and services (he thought) might be demised within this power; for it appears, that part of the manor was intended to be comprized within this power, but the demesne lands

Power to demise any lands, except the demesne lands of the manor. Copyholds are within the exception. Vide Ray. 132. P. p. 9. Y. l. 222. Moor 494. 2 Lev. 60. 149. 150. 1 Lev. 150. 241.

lands are not to be comprized ; then the rents and services must be ; for the whole of the manor consists in demesnes, rents and services : And if a man hath a power reserved to him of making leases of two things, and a qualification is annexed to the power, which cannot extend to one of these things, he may make a lease of that thing, without any regard to the qualification ; as where there is a power to make a lease of a manor, and every part thereof, so that such a rent be reserved upon every lease, as was paid for two years before, and it happens, that some part of the land was not leased at any rent within two years before ; a man may make a lease of such land reserving what rent he pleases ; for the intent appears to be, that he might make leases of the whole manor. 2 Roll. 26. pl. 10. And upon this authority was founded another such resolution, Hill. 27 & 28 Car. 2. between *Baker and Baker*, where a man had power to make leases of a rectory, tithes and other lands, reserving the ancient rent ; and it was held that he might make leases of tithes, although no rent can issue out of tithes ; but he might demise them without any rent, if it had pleased him ; for it appeared that tithes were within the power.

ROKEBY, J. was of opinion, that judgment should be given for the plaintiff ; but he differed in the reasons of his resolution from the rest of the judges : For he thought that by the power in the settlement *George Pawlett* might make leases, but with these restrictions, which are expressed or implied. First, That no land should be demised which was used for the maintenance and sustentation of the family ; for a lease of such land is prohibited by these words, " So as the lease be not made of any of the demesne lands, &c." By which words it was intended, that *George Pawlett* should not make leases of such land as was in the proper occupation of those who should be seised of the manor ; but it was not intended to restrain leases of customary land held of the manor. Secondly, That no land should be demised without reservation of the ancient rent ; for it was intended that the ancient income and revenue should be preserved according to the custom of leases in the western parts of *England*. Thirdly, That no land should be demised absolutely, but every demise should have its determination upon lives ; which three restraints are expressed in the settlement. Then the power annexed to the estate ought to be expounded strictly, and with a reasonable intendment ;

[41]

Carth. 427,

f. c.

Comb. 371.

1 Inst. 54.

[42]

De Term. S. Mich. 9 Will. 3.

tendment; for every power shall be taken with such a restriction, that the estate itself shall not be destroyed by it; so here there is a restraint from making leases of customary land held of the manor not by the express words, "so as it be not of the demesne lands," which words by the intent of the parties do not extend so far, but by implication; for if the customary lands might be demised, the manor will be destroyed; which could not be the intent of the parties. And so for these reasons, First, Because the lease was for thirty years absolutely, without being determinable upon lives, in which he went contrary to the other three judges; Secondly, For that a lease of the copyholds would by consequence destroy the manor.

ROKEBY held that judgment should be given for the plaintiff. Therefore by the whole bench it was adjudged for the plaintiff.

Case 26.

Richards and Corneford. In B. R.

An avow-
ant in re-
plevin may
abate his
own avow-
ry for part
of the rent
distained
for, before,
but not af-
ter, judg-
ment.
1 Ld. Ray.
255, f. c.
2 Salk. 580,
f. c.
Cro. Jac.
473.
5 Mod. 363.
Moor 281.
Hob. 133,
208.

ERROR of a judgment in C. B. in replevin, for cattle taken the 26th of September: The defendant, by his counsel, Mr. CARTEW, avowed the taking as a distress for rent reserved on a lease for years, which was made under the title of *Christopher* late Duke of *Albemarle*; and for the rent of two years and an half ending at *Michaelmas* the 29th of September, &c. he avowed. And this was now assigned for error; for the distress was made before *Michaelmas*, when the rent was in arrear; and notwithstanding that it was urged by MOUNTAGUE, that the distress was well made for the rent of two years; yet the court without difficulty reversed the judgment; for the avowry is for one intire rent, and the judgment accordingly; but before judgment, the avowant might have abated his own avowry for the half-year, and prayed judgment for the residue, and this would have been good. Judgment reversed *nisi causa*.

But afterwards the record was amended in C. B. and the error cured in B. R.

[43]

Case 27.

The King and Gripe. In B. R.

Vide Farl.
101.
Shaw, 1, 2,
105, 163.
3 Mod. 116,
134.

IN an INFORMATION of PERJURY. The information set forth that the defendant being sworn as a witness, had deposed, to wit "Master *George Stroud* about the middle of *July*

De Term. S. Mich. 9 Will. 3.

July, 1681, was at Newman (*Domum ipsius magistri Stroud* 6 Mod 176, 168.
at' Newnam apud Plimpton stæ. mar' in com' Devon innuendo, 5 Mod. 343.
revera præd' Georgius Stroud circa medium Julii vel in and 348.
qua ejusdem mensis Julii non fuit apud Newnam præd') And 1 Hawk.
 After a verdict for the King, the judgment was arrested by P. C.
 the opinion of the whole Bench, after several arguments Ca. 69.
 the bar, for the insufficiency of the information, because Carth. 421.
 the information did not shew where Newman was only Holt 535.
 the innuendo. Vide Sly. 333, 3 Cro. 428. Goldsb. 191. Comb. 449.
 ob. 3, 6, 45, 1 Roll. 82, 83, 84. 2 Bulf. 81, 82. 1 perjury
 ern. 337. Hutt. 42. 4 Co. 20. Yelv. 21, 1 Cro. 321. shall not be
 32. supplied by
 the innuen-
 do. Vide

v. 12, 4 Co. 17, b. Cro. Eliz. 346, 497. Hob. 2, 3, 45, 461. Hut. 65. Ketl. 174.
 39, 92. 1 Vent. 337. 1 Sid. 52. 2 Show. 305, 411. 3 Mod. 53, 54. 3 Lev. 691,
 1 Hob. 268. Cowp. 276. See Cro. Eliz. 865. 4 Bur. 2422. Innuendo may ex-
 in or apply, but cannot add to, or change the sense. Carth. 421. 5 Mod. 233. 4
 p. 17. Comb. 459. 3 Bulf. 265. 1 Bulst. 183.

Note, In this case, Holt denied the authority of Goldf. 191, and held that if a man gives evidence to the credit of a witness, though this be not the issue, yet it is perjury. 2 Salk. 514. 6 Mod. 168.

And it was also held, that where one is convicted upon the statute, it is part of the judgment to be disabled; but at common law it is only a consequential disability; that in the latter case, the King may pardon and restore to testimony; but not in the former, for in that case, to be restored judgment must be reversed. *Ibid.* 2 Salk. 461, 689, 691.

Anonymus. In Chancery.

Case 28.

A Gave a BILL of EXCHANGE for value received, B. A drawer of
 A. assigns it to C. for an honest debt; C. brings an *in-* a bill of ex-
debitatus assumpsit on this bill against A. and had judgment; change,
 in which A. brings his bill to be relieved in equity against though giv-
 his judgment, because there was really no value received at en without
 the giving this bill, and C. would have no prejudice who considera-
 might still resort to B. upon his original debt: It was an- tion, shall
 swered that A. might be relieved against B. or any claiming not be re-
 servant, or factor of, or to the use of B. But the lieved a-
 Chancellor held that C. being an honest creditor and coming gainst a
 by this bill fairly for the satisfaction of a just debt, he third per-
 would not relieve against him, because it would tend to de- son to whom
 stroy trade which is carried on every where by bills of it was af-
 exchange, and he would not lessen an honest creditor's se- signed for
 curity. an honest
 debt.

Dorn

[44]
Case . 9.

Dorn and Gashford. In B. R.

Termor for
years can-
not declare
upon a *que*
estate.

ACTION UPON THE CASE for the obstruction of a way brought by a lessee for years; who declared *quod ipse & omnes illi quorum statum ipse habet in messuagio prædicto de tempore cujus contrarii memoria hominum non existit habuerunt & de jure habere consueverunt quandam viam* to such a place; and after a verdict for the plaintiff,

NOT THEY moved in arrest of judgment, and took the following exceptions. First, That a lessee for years ought not to claim by a *que estate*. Secondly, Here is not laid any *terminus a quo* the way begins.

WRIGHT Serjeant, answered to the first objection, that it is true that a lessee for years cannot claim by a *que estate*, but that the declaration would have been sufficient if the plaintiff had said only *quod ipse habuit & de jure habere consuevit quandam viam*; for in such an action for the obstruction of a way the plaintiff need not make any title, as it was resolved 2 Cro. 123. and between *St. John* and *Moody*, Vent. 275. and between *Blooby* and *S'ator* in C. B. and then the addition of *omnes illi quorum statum de tempore cujus*, &c. is surplusage and shall be rejected after verdict. To the second objection he answered, that the plaintiff ought to shew a *terminus a quo*, and this would have been held ill upon demurrer, but after a verdict it is helped; for the jury have found that the plaintiff had a way, and it is not material from what place it begins.

A third exception was taken to the declaration; but the court said nothing to the second or third exception, but upon the first the judgment was arrested; for the court agreed that the declaration would have been good without the allegation of any title in the plaintiff; as it was settled in the case between *Stroud* and *Bird*; but as the plaintiff hath set forth a title by prescription, and failed in it, it is ill and shall not be aided. And

[45] HOLT, C. J. said, that in the time of Lord Chief Justice *Hale* it was held ill, that the plaintiff being a lessee for years had declared that he was possessed of an ancient messuage; for an ancient messuage shall be intended to be one time out of memory; yet there the plaintiff had declared that he was possessed, and it was said that it ought to be proved upon evidence, as the plaintiff had so declared upon prescription.

De Term. S. Mich. 9 Will 3.

description, otherwise the plaintiff could not recover. And judgment in the principal case was arrested.

Thomson and Leach. In B. R.

Case 30,

JUDGMENT on the demise of *Charles Leach*; the defendant pleaded Not guilty, and a special verdict was found to this effect, viz. *Nicholas Leach* being seised in fee of the lands mentioned in the declaration, by his will dated the 10th of December 19 Car. 2. devised them to his brother *Simon Leach* for life, remainder to the first son of his body begotten, and the heirs male of the body of such son, remainder to the second and third son, &c. in tail male; and for default of such issue, remainder to Sir *Simon Leach* and the heirs male of his body, and for default of such issue, remainder to the right heirs of *Nicholas* the testator, who was seised, and after his decease, *Simon Leach*, being *non compos mentis*, 23 Aug. 25 Car. 2. executed a deed of surrender to Sir *Simon Leach*, whether such a surrender was good without the notice of Sir *Simon* was doubted in C. B. and there adjudged that it was not by three of the judges against *Ventris*, see 2 Vent. 198. and this was afterwards affirmed in error brought in B. R.. After such surrender, viz. 1 Nov. 25 Car. 2. *Simon Leach* had issue *Charles Leach*, the lessor of the plaintiff; *Simon Leach* dies, and *Charles* his son enters as in his remainder, and Sir *Simon Leach* ejects him, &c.

Whether the surrender of a person that was non compos mentis is absolutely void.

4 Rep. 126.

WRIGHT, serjeant, who argued for the plaintiff, reduced the case to two questions; First, Whether the deed of surrender made by *Simon Leach* tenant for life, he being *non compos mentis*, was void or only voidable? Secondly, Admitting that it was only voidable, whether *Charles* the lessor of the plaintiff could avoid it?

But by **NORTHEY** on the other side, and the court, it was agreed that the second question could not in this case come into debate; for the surrender of *Simon Leach* the tenant for life, made to Sir *Simon Leach*, in the remainder before the birth of *Charles* the lessor of the plaintiff, had destroyed the contingent remainder, which *Charles* claims, if ever such surrender was good, notwithstanding even if it was afterwards avoided; for if the particular estate be destroyed before the contingency happens, the contingent remainder cannot vest, for the remainder ought to take effect during the

the particular estate, or *eo instante* that the particular estate determines. If a man grants or bargains and sells the reversion to husband and wife, seised for life in right of the wife, the mesne contingent remainder is destroyed; yet the wife may waive the estate after the death of her husband, 2 Saund. 386. for, as NORTHEY said, a future right of entry cannot support a contingent remainder, but a present right of entry may: As where a man who is tenant for life is disseised, the contingent remainder thereupon descendant is not destroyed. And NORTHEY cited Cro. Car. 102. if a feoffment is made to the use of husband and wife, remainder to the heirs of the survivors, and the husband afterwards makes a feoffment, the contingent remainder to the survivor is destroyed. But,

HOLT C. J. said that was a very nice case, for the wife might avoid that estate, and at the death of the husband, as her time to avoid it then happened, the contingency also happened at the same time. And,

HOLT, C. J. also said, that if a man who is tenant for life with a contingent remainder, makes a feoffment with a condition, and afterwards enters for breach of that condition, the contingent remainder is destroyed, if the contingency happened before the condition broken; so also if the contingency happens before the entry, although it be after the condition is broken, for a title of entry is not sufficient to support a contingent remainder, no more than a future right; but if the tenant for life enters for breach of the condition and revives his estate, and that before the contingency happens; in such case the contingent remainder may vest, for by the re-entry of the tenant for life he is restored to his former estate; and for the same reason here in the present case, if the surrender of *Simon Leach* who was *non compos mentis* was only voidable, the particular estate was still destroyed by such surrender for such time as it remained in force; besides the particular estate was expired and determined by the death of *Simon Leach*, and how can his heir avoid an estate which is executed? an avoidance is [47] of a tortious act, and restores the estate; but here the surrender of the tenant for life was in force during his life, and after his death it cannot be restored or revived, for it is absolutely determined and hath no essence or being at all: Wherefore,

NORTHEY

De Term. S. Mich. 9 Will. 3.

NORTHEY was of opinion, and the Court with him, that the second question might be waived, and that this was the only question in the case, viz. Whether the surrender of a person who was *non compos mentis* was absolutely void?

NORTHEY argued that it was not void, for he himself, *Simon Leach*, could not avoid it; and if it was void, it must be void to all intents and purposes, and how then can a man's deed be void, which binds him himself? But,

HOLT, C. J. inclined to the opinion that his (*Simon Leach*) deed was void, although it might have been in force against the *non compos mentis* himself, for that being in force against himself is founded upon the maxim, that no man shall be admitted to disable himself; the deed of an infant is void, although he cannot plead *non est factum*; for when it hath all the essentials of a deed, it shall be intended that the maker was of full age, if he does not plead nonage. *See* *Forjournatur*.

Jones and Mosely. In B. R.

Case 31.

THE case before mentioned was now argued by Mr. BRODRICK for the plaintiff, and by Mr. WEBB for the defendant. And BRODRICK insisted that the indenture of the 31st of January, altho' it might not be good as an indenture, yet may be taken as a deed poll, and is sufficient to declare the uses of the fine, which not being levied pursuant to the indenture of the 29th of January, but being valued from it in the circumstance of time, any other deed or instrument is sufficient to declare the uses thereof, which for that reason shall be governed here by the deed of the 31st of January.

WEBB on the other side said, that the deed of the 31st of January being between husband and wife was void (for the husband cannot make a covenant with his wife) and being void as an indenture it cannot be taken as a deed poll. But he thought that the principal point in this case was, Whether the indenture of the 29th of January was not sufficient to govern the uses of this fine? The indenture recites, that whereas a fine had been acknowledged, &c. the said parties should levy the said fine of such and such lands next Hillary term; and the fine was levied of the same parcels between the same parties the same Hillary term, for the indenture bears date within Hillary term, which begins

Ante 29.
Where a conveyance to uses, cures by way of transmutation of possession, the uses may be declared or revoked without deed.
2 Lev. 77.
149.
Carth. 410.
1 Co. 153.
4 Mod. 261.
2 Keb. 366.
Raym. 239.
Show. Parl. Ca. 140.
1 Vent. 278.
368.
2 Ro. Abr. 749.
2 Rep. 71.
b.
1 And. 126.
Dyer 309.
on 2 And. 240.

De Term. S. Mich. 9 Will. 3.

[48] on the 23d of January ; then it is to be considered whether
 Moor 789. the words (next Hillary term) shall be intended of Hillary
 2 Roll Abr. term next after the caption of the fine, or of Hillary term
 251. term next after the date of the indenture ; the most benign con-
 Bridg. 112, struction in this case ought to be made, *ut res magis valeat*,
 f. c. *Ec.* And as the word (next) may be applied either to the
 Comb. 429. caption of the fine or to the date of the indenture, it ought
 Cases B. R. 159 to be applied here to the caption of the fine, forasmuch as
 Holt 321. by such application the whole conveyance will be good, but
 otherwise it will be destroyed.

D E

Term. Sanct. Hill.

9 Will. III. in B. R.

[49]

Anonymous.

Case 32.

ASSUMPSIT. The plaintiff declares, that the defendant, in consideration of 20l. given to him by the plaintiff, assumed on the 29th of October 1696, to assign 500l. bank-stock to the plaintiff for the sum of 365l. at any time when he should be requested before the 10th day of May then next ensuing; and the question arose upon the statute of 8 & 9 W. 3. c. 32. by which it is enacted, That every policy, contract, &c. made or to be made by any person or persons whatsoever, and which by the tenor thereof is to be performed after the first day of May 1697, upon which any premium already is, or hereafter shall be given, shall be paid for liberty to put upon or to deliver, receive, accept or refuse any share or interest in any joint-stock, tallies, orders, exchequer-bills, exchequer-tickets, or bank-bills whatsoever, (other than such contracts, &c. as are to be performed within three days from the time of the making,) shall be utterly null and void to all intents, &c. By which statute, every contract by the tenor of it to be performed after the 1st day of May 1697, is avoided: And whether this contract which was made on the 29th of October 1696, by which the plaintiff had time to request the assignment of the bank-stock to be made to him until the 10th day of May 1697, was within the statute, and made void thereby, was the question in debate. And,

A contract performable as well before, as after a day mentioned in the statute of 8 & 9 W. 3. as the election of the party, is not within that Act of Parliament.

NORTHEY argued that it was not; for this is not a contract, which by the tenor of it is to be performed after the 1st day of May 1697. For although the plaintiff had liberty to perform the request of the assignment of the bank-stock to him until the 10th day of May 1697, which was three days after the act took place, yet such request might be made before the 1st of May, and so the contract by the tenor of it was not to be performed after the 1st day of May; for

[50]

for a contract to be performed after the 1st day of May is intendable of such a contract which of necessity ought to be performed after that day, and cannot be performed before; but a contract performable as well before, as after that day, at the election of the party, is not within the Act of Parliament, but is *casus omisus*; and he compared it to a case upon the statute of 29 Car. 2. c. 3. of frauds and perjuries, by which it is enacted, that no action shall be brought, &c. whereby to charge any person, &c. upon any agreement which is not to be performed within a year from the making thereof, unless the agreement be in writing; and an action was brought upon an agreement by the defendant to pay so much upon his marriage, but without any writing or *memorandum* of the agreement, and the defendant did not marry within the year.

Upon the trial at *Guildhall* before HOLT C. J. he was in doubt, whether that agreement was within the statute, and whether it ought not to have been by writing? and ordered that the opinion of the Judges of the Court should be taken. And by the major part of the Judges in B. R. it was resolved, that this was *casus omisus*; for that the defendant might have married within the year; and so it was not an agreement which was not to be performed within a year, and by consequence was not such an agreement as was intended by the Act of Parliament; and he said he did not see any diversity between the cases.

Case 33.

Ram and Thacker. In B. R.

Where an Act of Parliament shall have the effect of a recovery.

[51]

ERROR of a judgment of the King's Bench in *Ireland*, depending here for many years, and the judgment was now affirmed. The case was upon divers acts of settlement made in *Ireland*, by which every one who accepted Letters Patent shall have thereby a clear estate, and avoid all former settlements, or to that effect. *Waldron*, the lessor of the plaintiff, was the issue in tail and heir male, who claimed under a settlement made by his ancestor on marriage, by which the estate was intailed, and after such settlement made that ancestor surrenders his estate, and takes out new Letters Patent: And whether such surrender and acceptance of a new Patent had avoided the prior settlement made a short time before was the question. And it was resolved that they had avoided it; for by the settlement he had an estate-tail, which

which might have been docked; and therefore such surrender and acceptance shall have the force of a recovery by the operation of the statute; and so the estate-tail was barred, and the estate descended to the heir general, who was married to *Thacker* the defendant.

Britton and Cole. In B. R.

Case 34.

TRESPASS for the taking of forty-three ewes and two lambs. The defendant pleaded, that one *Chiswick* was outlawed, and that after outlawry an inquisition went upon which it was returned; that *Chiswick* was possessed of lands, where the ewes and lambs were taken, to the value of 55l. per annum, and afterwards a *levari facias* issued out of the Exchequer, commanding the Sheriff to levy the said value out of the issues of the said lands; upon which the Sheriff made out his warrant to A. and B. to levy, &c. To whom the defendant shewed the said ewes and lambs, being levant and couchant upon the land, and prayed them to make execution, &c. which is the same trespass upon which, &c.

Upon this plea the plaintiff demurred. And after divers exceptions to the pleadings, and divers arguments to the matter of law, the Court now declared their opinion.

HOLT C. J. who spoke for the rest of the Judges, declared, that the Court was of opinion, as to the matter of law, with the defendant; and this was the case: *Chiswick* was outlawed, an inquisition goes, upon which it is returned, that he had land to the value of 55l. per annum; afterwards, upon a *levari facias*, the cattle of a stranger levant and couchant upon the land are taken and sold: And it was the opinion of the Court, that the cattle of a stranger may well be sold in such a case, for they are the issues of the land; the statute of Westm. 2. 13 Ed. 1. 9. explains what shall be accounted issues of land, (to wit) rents, corn, and all moveables; the which word [moveables] extends to cattle. The cattle of the owner of the land are issues without question, and so are also the cattle of a stranger levant and couchant; for the statute makes no distinction, and the words of the statute are general, viz. all moveables. Another reason why the cattle of a stranger may be taken upon *levari facias* is, because the land is the debtor to the King; and if the cattle of a stranger could not be taken when they are levant and couchant, the King may be defeated of all the profits;

Outlawry. The moveables of a stranger levant and couchant may be taken on a *levari facias*. Carth. 441, 444. 2 Inst 453. Flet. 68. 5 Mod. 109, 112. 1 Salk. 408.

Issue out of lands not forfeited by outlawry till inquisition taken, and [52] alienation before inquisition is a bar. 1 H. 7. 7. 19 H. 7. 30. 3 Cro. 431. 21 H. 7. 7. 3 D. 305 pl. 1. S. C. 1 Salk. 395, 408. Comb. 469, 434. Skin. 617. Cas. B. R. 175. Holt 421. 1 Keb. 57, 74, 76.

Com. Dig.
646.

12 Mod.

178.

Alienation
after out-
lawry and
before in-
quisition is
good to bar
the King of
the penan-
cy; but if
feoffment
be made af-
ter inquisi-
tion the
feoffee has
the estate
and the
King shall
have the
profits.

21 Hen. 7.

19.

Hard. 101.

Ray 17.

Dr. & Stud.

Dial. 1. c.

22.

2 Ro. 159.

Lane 79.

3 Cro. 431.

Beasts of a

stranger le-

[53]

vant and

couchant

feasible on a

levari facias

2 Salk. 448.

Lane 79.

Eliz. and he

157, 159.

178 Carth.

444.

Intrepass

a common

variable. 1

Leon. 50.

446. 447.

2

Lell. 135.

1 Salk.

410.

2 Vent.

94.

profits; for the person outlawed may make a contract with a stranger to depasture his cattle, and so avoid the effect of the outlawry; for such a contract cannot be discovered, or if it be, there can no levy be made by the King. The writ of *levari facias* commands the Sheriff, that he levy *de exitibus terra*; and if there are not any issues upon the land, but only the cattle of a stranger, and those cannot be taken, the King cannot be answered with any profit. The cattle of the party outlawed cannot be the only things to be taken, for he hath no goods, all his goods are forfeited to the King; and therefore if it were said, that his cattle only ought to be taken, it must follow that the King should be satisfied out of his own proper goods. But it ought to be considered what process issue out of the Exchequer, for the better understanding of this matter; the process of *capias* extends to the person; the process of *fieri facias* extends only to the goods and chattels of the person himself, but not to those of a stranger; another process is the *extendi facias*, and this is only an extent upon the land; another process is called the *long capias*, the which contains all the precedent ones; for by this it is commanded, that the Sheriff take the body, levy the goods and chattels, and extend the land of the debtor; but in none of these processes can the goods of a stranger be taken: But the *levari facias* extends to the issues of the land; the land is the debtor, and all moveables upon the land may be taken; and therefore it is adjudged Cro. Eliz. 431. *Stafford and Bateman*, that upon a *fieri facias* the goods of a stranger could not be sold for a debt to the Queen*.

levari facias; so of joint tenant and commoner unless the title found by inquisition. Far. 31.

2 Salk. 448. Issue of joint tenant for life, leviable on reversioner. 2 Roll. Abr. 157, 159.

Lane 79. *This case of *Stafford v. Bateman*, is said not to be law in Leach's ed. of Cro.

Eliz. and he cites a MS. of Lord Chief Baron Parker. Vide 2 Com. Dig. 646 2 Roll. Abr.

157, 159. 1 Salk. 395. Skin. 618. Comb. 469. Lane 79. Ld. Ray. 305, 308. 12 Mod.

178 Carth. 444. 2 Inil. 453. Fleta 68. 5 Mod. 109. 1 Salk. 408.

for taking goods the officer need only shew a writ of execution otherwise

a common person, unless in aid of the officer by his command. The command is in-

variable. 1 Salk. 107, 409. Lutw. 1566. Cro. Car. 394. 2 Lev. 210. 3 Lev. 20.

Leon. 50. 2 Leon. 196, 215, 216. Cro. El. 14. pl. 3. 540. 8 Co. 67. a. Vide Cro. Car.

446. 447. 2 Lell. 135. 1 Salk. 410. 2 Vent. 94.

JUDGMENT against a testator, and a *scire facias* was brought thereupon against the executor, bearing *teste* the 4th of October, and returned *die lunæ prox' post mens' Michaelis*, which was in truth the 31st of October; then the second *scire facias* bore *teste* the 31st of October, and was returnable *die lunæ prox' post crastinum animarum*, which was the 7th of November.

Fifteen days between the *teste* and return of two *scire facias*'s inclusive is sufficient.

And now it was moved by Sir BARTH. SHOWER, that the *scire facias* was erroneous; for there are not fifteen days between the *teste* and return of the *scire facias*, but only fourteen. *Sed non allocatur.*

For it was answered by BRODERICK, and agreed to by the Court, that it was right; for between the *teste* and the return of the first *scire facias* there are seven days exclusive, and between the *teste* and return of the second *scire facias* there are seven days exclusive; so between the *teste* of the first and the return of the last *scire facias* there are fourteen days exclusive, and fifteen days inclusive, which are sufficient; and so it was resolved between Levingston and Stoner, R. Mich. 34 Car. 2. which is reported 2 Jon. 228.

And in Levingston's case the Court would not take notice of the Almanack of the day of the month, in order to void the *scire facias*.

Term. Sanct Mich.

10 Will. III. in B. R.

[54]

Case 36. Heylin, Executor of Read, and Captain Hastings.

A condi-
tional pro-
mise will
avoid the
statute of
limitations.
1 Salk. 29.
S. C.
Carth. 470.
2 Show.
126.
2 Vent. 151.
1 L. Raym.
389, 426,
425, 441.
5 Mod. 129.
Ca's B. R.
223.
Holt 427.
Buller N P.
148.

Acknow-
ledgment of
the debt af-
ter com-
mencement
of the ac-

[55]
tion takes it
out of the
stat. of li-
mitations.
2 Burr.
1099.
The tight-
est word of
acknow-
ledgment
will take
the debt out

INDEBITATUS *assumpsit* for goods sold and delivered by the testator to the defendant. The defendant pleaded *non assumpsit infra sex annos*, and at the trial before HOLT C. J. at Guildhall, the evidence for the plaintiff was as follows,

That the goods were sold and delivered to the defendant by the testator in the year 1688; that within three years now last past (so more than six years had elapsed since the cause of action had accrued) the defendant promised, if the plaintiff could prove his debt, he would pay it; and whether this evidence proved the issue for the plaintiff,

HOLT C. J. doubted at the trial, and directed the matter to be moved for the opinion of the Court. And it was agreed by the whole Bench, that if a man is indebted to another; and six years elapse afterwards, and then the defendant promises payment and acknowledges the debt within six years before the action brought, evidence of such promise and acknowledgment is good to maintain an action, where *non assumpsit infra sex annos* is pleaded; but if a man after the six years acknowledges the debt, but does not promise the payment, it shall not charge him; by ROKEBY J.

But HOLT, C. J. said, that it had oftentimes been held that an acknowledgment of the debt without promise of payment by the defendant was sufficient to charge him, and this he thought was good law, but that it had been held otherwise also; and it was agreed by the Court, that if the plaintiff had declared upon a special assumption, viz. that his testator having sold such merchandize to the defendant, the defendant, in consideration that the plaintiff could prove the said debt, promised that he would pay and content the plaintiff the said sum of money, and had averred that his testator had sold the goods; the defendant upon such special declaration would have been chargeable, and the plaintiff in

De Term. S. Mich. 10 Will. 3.

in such a case needs only to alledge that the testator had sold, of the stat. for the proof of the debt will be brought in the same action. 5 Burr. But the doubt was upon such a conditional promise after the action was barred by the statute, whether that should give an action founded upon the first contract; if it had been made before the six years had been passed after the first contract. 2630.

HOLT C. J. thought it would have been sufficient although six years had passed before the action commenced; but here seems a diversity, for the action is gone before this conditional promise is made. *Sed adjournatur.*

And now HOLT C. J. said that he had talked with all the Judges of England, and that ten of them upon consideration agreed that such a Parlane, as to *prove it due and I will pay you*, after six years elapsed, was sufficient evidence for the plaintiff to maintain his declaration, upon *non assumpsit infra sex annos* pleaded. For the defendant here makes an express promise *I will pay you*, but it is conjoined with this condition *prove it due*; so he expressly promises payment upon proof of the debt, which proof may be made in the same action. And they all agreed also, that if a man acknowledges a debt after six years elapsed, it is good evidence of an *assumpsit*, upon *non assumpsit infra sex annos* pleaded, for the jury to find a verdict for the plaintiff, but it is not a matter upon which, if it were found specially, the Court will give judgment for the plaintiff. And, [56]

ROKEBY resembled it to the case 10 Co. 57. a. demand and refusal is evidence of a conversion, but if it is found specially, the Court cannot adjudge it to be a conversion; so this term judgment was given for the plaintiff*.

The statute of limitations does not destroy the debts, it only takes away the remedy. 5 Burr. 2650.

Hardres 48.
6 Mod. 212.
11 Co. 79.
5 Co. 27.
61, 110.
2 Co. 25.
2 Fitzgib.
184.

THIS

* Statute of limitations can not begin to run against a plaintiff who is a foreigner until he comes into this realm. 3 Will. 145.

The latita is the true commencement of actions brought by bill of Middlesex in Com. Pleas a capias, within the meaning of the statute. 1 Blackf. Re. 16. Sty. 156. 1 Sid. 53. 2 Blackf. Rep. 925. 2 Burr. 961.

Statute of limitations extends to bar plaintiffs resident in Scotland, 1 Blackf. Rep. 286.

The statute does not run, in case of a promise of contingency till the contingency happens. 1 Blackf. Rep. 354. Viner 524 contra, but denied to be law by LORD MANSFIELD C. J.

A foreigner always residing abroad is not bound by the statute of limitations. 2 Blackf. Rep. 723.

Attachment

De Term. S. Hill. 10 Will. 3.

THIS term Sir *Henry Gould*, Knt Serjeant at Law, received Letters Patent to be a Judge of the Court of King's Bench, in which Office he succeeded Sir *Samuel Eyre*, Knt. who in the Summer Assizes died upon the circuit.

Attachment of privilege though informal, being returnable on a general return is a sufficient commencement of an action to avoid the statute of limitations. 2 Blackf. Vide Rep. 1131. Salk. 428. Ld. Raym. 772.

A petitioning creditor's debt admitted though above six years standing, 1 Stra. 746. 5 Burr. 2630.

A bill may be filed in vacation against an attorney to prevent the statute from attaching. Doug. 313.

There may be cases which fraud will take out of the statute, Dougl. 656.

D E

Termino Pasch.

11 Will. III. in B. R.

[57]

The Governors of the Bank of England *and* New- Case 37.
man.

ASSUMPSIT for money lent; and upon motion for a Bill of Ex-
change, new trial, the case appeared to be this: One *Bellamy* where the
gives his bill of exchange to *Newman*, payable to him or receipt of it
bearer on the 1st of April ensuing; before the 1st day of shall be tan-
April *Newman* discounts the bill with the Governors of the tamount for
Bank, who sent the bill after the day to *Bellamy*, and he ac- the receipt
knowledged it, but it was not paid; on the 8th of June en- of the mo-
neey.
suing, before payment of the bill, *Bellamy* becomes insol- 1 Salk. 131.
vent; for which reason the bank came upon *Newman*, and Mod. Cases
brought this action; and a verdict was found at *Guildhall* 37.
for the plaintiff. But the Court granted a new trial for two Skin. 410.
Holt 116.
reasons; Vide 6 Mod.
147.
2 Strange
1175.

First, For that the bank having discounted the bill with
allowance, it was a purchase in them of the bill.

Secondly, The bill was not received at the day when the
bill was good, and *Bellamy* solvent, which delay was laches
in the bank.

D E

Term. Sanct. Trin.

11 Will. III. in B. R.

[58]

Case 39.

Iveson and Moor.

An action
lieth not for
a general
nuisance
where a par-
ticular da-
mage to the
plaintiff is
not laid.
1 Salk. 15.
S. C.

Ld. Raym.

486. S. C.

Carth. 451.

Mod. Cases

353.

Comb. 480.

S. C.

Holt. 10.

Cases B. R.

162.

ACTION upon the case. The plaintiff declares that he was possessed of two coal mines in B. and had provided a large stock of coals, and the defendant *maliciose intendens proficuum carbonum præd' totaliter perdere & deprivare altam regiam viam per quam emptores carbonum in carbonar' præd' carriare præd' carbones ire & transire usi fuerunt cum lapidibus obstupavit, per quod* the plaintiff lost divers customers, who carbones præd' emere voluerunt & præd' carbones multum dam-
nificati & depretiati fuerunt ad damnum, &c.

Upon Not guilty pleaded and a verdict for the plaintiff, it was moved in arrest of judgment, that the action was not well brought.

And after argument at the bar, the case was solemnly argued by the bench; and **TURTON** and **GOULD** Justices, were of opinion that judgment should go for the plaintiff, and it was granted by them, that for a general nuisance an action of the case lay not, but here is a special damage alledged. The only question is, Whether this special damage is sufficiently alledged in that which follows the *per quod*, where it is not said what customers the plaintiff had in certain, or that he had any customers at all? And it was held by those two justices that the damages were well alledged after the *per quod*, &c. and that there was sufficient certainty, for there is no need of more certainty than what is sufficient to shew that the plaintiff is damnified. In an action upon the case for diverting the water-course of a mill, *per quod proficuum molendini sui amisit*, this sufficeth without an allegation that he had any customers who would have ground at his mill; and,

GOULD J. took a diversity between such case where the damage accrues by one particular act (for there it ought to be alledged with certainty) and where by divers acts, for in the

[59]

Br. Tit.

Nuf. 1.

Br. Action

in case 6.

Goib. 343.

1 Cro. 500.

1 Leon. 206.

Allen 22.

1 Vent. 113.

Holt. 248.

De Term. S. Trin. 11 Will. 3.

the last case there cannot be any such certainty; as here the plaintiff cannot well know what customers he loses, and perhaps did not know all his customers, and cited a case between *Baker and Moor*, Hill. 8 Will. 3. rot. 316. in B. C. where it was held that the plaintiff need not assign in certain what persons could not come to his house, for the plaintiff declared that he had a house and a way to it, which the defendant stopped up, *per quod* the people could not come to his house, &c. but for another reason, judgment in that case was given for the defendant; and he cited 2 Jones 156. Job. 284. 2 Cro. 510. And,

GOULD J. was of opinion with the plaintiff for another reason, which was, because this action was against a wrongdoer, and compared this case to those of *St. John and Moody*, and *Stroud and Birt*. *Vide ante* fo. 7. But if this declaration would not have been good upon demurrer, yet it was held by both of them that the verdict had aided it; and many cases were cited where a verdict had aided things not certainly expressed. Allen 22. 1 Leon. 236. 1 Roll. 63. Vent. 3 2 Vent. 114. But by,

HOLT C. J. and ROKEBY J. judgment in this case ought not to be for the plaintiff, by reason that for a general nuisance an action upon the case lieth not (as it is granted) and the offence here is a general nuisance; and, as,

HOLT C. J. said, the offence being in the highway, that made it a general offence, and although the plaintiff inhabits near the highway, yet it does not give him a property in such way; and in all the cases where an action upon the case lieth the plaintiff hath a property, as in the action for diverting the water-course to a mill, the plaintiff had a property in the water-course; so in the case between *Baker and Moor*, that was a private way in which the plaintiff had right; and he cited 3 Cro. 664. 2 Saund. 115.

ROKEBY J. said the reasons why an action lieth not for a general nuisance are, first, because the king is intrusted with the remedy for a general nuisance. Secondly, For the avoidance of multiplicity of suits. But it is objected that there is a special damage, which was denied by HOLT and ROKEBY, for the damage in general was done in the highway; and as the plaintiff sustained damage, all those who pass that way have damage also; the plaintiff may have more inconvenience, but hath no other damage but what is common to others. In an indictment for a nuisance in the highway, it is laid *ad commune nocumentum omnium per viam illam*

A verdict may aid things not certainly expressed.
Holt C. J. and Rokeby J. decided this case in Leonard to be Law.
1 Salk 16.
Action for a nuisance will not lie except the plaintiff has a particular right, and suffers a special injury.
Cro. Eliz. 664.
Co. Litt. 56, a. 166.
5 Co. 73.
101.
[60]
1 Ro. 88.
4 Co. 86.
2 Jones 157.
9 Co. 54.
112, 113. a.
Moor 180.
2 Inst. 405.
1 Show. 243.
255.
Carth. 191.

3 Mod. 289. *illam euntium & transeuntium*; and the present case is, that
 6 Mod. 46. the defendant had made an annoyance to all that pass in the
 1st Raym. way where he had thrown down his rubbish; the plaintiff
 493. hath not any particular damage. And,
 1 Salk. 12. HOLT C. J. said, that the damage on which an action is
 Com. b. 180. founded in such a case, ought to be one peculiar and extra-
 1 Hawk. ordinary damage. And,
 366. ROKBY J. said, that it ought not only to import a da-
 Com. p. 86. mage but a tort also; and as to the case 27 H. 8. where a
 The da- man had a house on the one side of the highway and land
 mage of ght to be par- on the other side, and had not any passage from his house
 ticular. to his land, but only crosses the said highway, there the high-
 2 Cro. 416. way being stopped, *Fitzherbert* held that he might have an
 1 Inst. 36. 2. action, but *Baldwin* was of a contrary opinion; and,
 1 Roll. Abr. 36, 56. HOLT C. J. said, that the law hath been according to
 Cro. Eliz. 664. the opinion of *Baldwin* ever since, and denied the case 2
 1 Salk. 12. Jones 156. to be law as it is there reported; and these two
 Vargh. 335. judges agreed that if an action were maintainable, the de-
 2 Rep. 79. claration here is not sufficient, for the damage ought to be
 Carib. 191. certainly alledged, that the Court may judge in what the
 2 Lev. 214. particular tort and damage consist; if the declaration had
 223. ended at *per quod*, it had not been sufficient, then the al-
 legation afterwards is not sufficient, for the customers are
 uncertain and not known. And,

HOLT C. J. denied the case 1 Roll's Abr. 63*.

Case 39.

Juxon & Ux' and Naylor. In B. R.

Amend- A *FIERI FACIAS* bore teste on a day out of term, and
 ment, where whether it was amendable, or not, was the question,
 it shall be. And it was granted, that a writ of enquiry is amendable,
 Godb. 78. for there is the roll by which it may be amend-
 [61] ed; so a *venire facias*, &c. for there is an award by which
 it may be amended, and in the present case the Court would
 amend the *fieri facias* if it could; but there is no award
 upon the roll for the *fieri facias* by which the amendment
 can be made.

* For the damage must be specially shewn where the words themselves are
 not actionable. 1 Salk. 16. 1 Roll. 58. n. 1. 1 Cro. 140. 1 Roll. 34, 35,
 36.

AN INDICTMENT upon the statute of 8 H. 6. for a forcible entry, was found before the justices of the peace, but no restitution was awarded at the time of the conviction, but at the end of two years and a half restitution of the possession upon this indictment was awarded to the party ousted; and now upon a motion (after deliberation) restitution was granted by the whole Court; for as the indictment was found, restitution ought to have been awarded immediately, for the intent of the statute was to give a present remedy, and for that reason does not delay it till the quarter-sessions, but impowers a private Justice to put the act in execution; but if he does not restore the party ousted, he does not put the act in execution as required. And,

HOLT C. J. grounded his opinion upon 8 Co. 120. *Bonham's case* towards the end: If a man is imprisoned upon the statute of 14 H. 8. by the Censors of the College of Physicians, he ought to be committed immediately, and there it is said that the justices of the peace upon their view ought to commit the offenders immediately*, and for the same reason ought they upon 8 H. 6. to make restitution immediately.

ly. 8 Co. 119. b. 2 Brown. 266. 2 Inst. 380. Br. Account 6. Det. 16. Exec. 135. Faux imprisonment 32. 2 Bull. 139. 6 Mod. 125.

* As in case of a conviction of a forcible entry upon view, upon the stat. 15 Rich. 2.

Restitution ought to be made immediately upon a conviction of a forcible entry.

3 Salk. 313. S. C.

Ld. Raym. 440, 482.

Restitution three years after inquiry held good.

5 Mod. 443.

A writ of restitution is ex gratia.

Hard. 97.

Commitment on sta.

14 H. 8. or

by justices

on view

ought to be

immediate-

Term. Sanct. Hill.

11 Will. III. In B. R.

Budge and Floyd.

Case 41.

Remainder
when it is
contingent,
and when
it vests.

1 Salk. 232.
S. C. called
there Budge
& Floyd.
1 Salk. 224.
Raym. 28.
1 Sid. 47.
Far. 69.

THE case was this: *John Floyd* seised of the land in question in fee, upon the marriage of his son settles it to the use of himself for life, afterwards to the use of *John* his son for ninety-nine years, if he so long lived, afterwards to the first, second, third and fourth issue of *John* the son in tail male; remainder to the heirs male of the body of *John* the son; remainder to *John* the father, and the heirs male of his body; remainder to the right heirs of *John* the father: Afterwards *John Floyd* the father makes his will, and thereby devises, (he having issue *John* the son by one venter, and three sons by another venter, viz. *Thomas*, *Paul* and *Peter*,) that the same land, after the death of *John* his son without issue male, should go to *Thomas* his son, and the heirs male of his body; and if *Thomas* should die without heirs male of his body, to *Paul* and the heirs male of his body; and if *Paul* should die without heirs male of his body, his brothers then not being living, then to *Peter* and the heirs male of his body; then takes notice, that he would have the estate continue in his name and posterity; but if there should be no heirs male, then he limits it to the heirs female, &c.

In the year 1669 *Paul* dies without issue; in the year 1674 *Thomas* dies and leaves issue, under whom the defendants claim; in the year 1679 *Peter* dies, having issue the lessor of the plaintiff; in the year 1684 *John* dies without issue, but had at first suffered a recovery to the same uses as are limited by the will; this seemed to be the effect and substance of the case; in which the question was between the son of *Peter*, the lessor of the plaintiff, and the assignees under *Thomas*.

HOLT C. J. gave judgment for the plaintiff, and delivered the opinion of the whole Court for the plaintiff.

And

And the first question was, whether the remainder limited *Peter* was a contingent remainder, or a remainder vested? if it were a contingent remainder, judgment would have been for the defendant. And it was objected from the bar, that the remainder to *Peter* was contingent, for that the words limit it to him after the death of *Paul* without issue male, *his brother's then not being living; so that *Peter* was not to have the land if his brothers were living, when *Paul* died without issue.

* This first question arose on these words, "his brothers then not being living."

thers then not bei g living."

But the Court held this to be a remainder vested; for the words *his brothers then not being living*; are no more than a repetition of what was before expressed; the devise was to *Thomas* and the heirs male of his body, then to *Paul* and the heirs male of his body, then to *Peter* and the heirs male of his body; so that *Peter* could not take if his brothers were living, for *Thomas* and *Paul* must be dead before the estate could come to *Peter*; then though it be expressed in direct terms, that *Peter* shall not have the estate, but only after the death of *Paul* without issue, his brothers then not being living, which was implied, (for the estate of *Thomas* and *Paul* could not be determined during the time that they were living,) such expression or repetition of words which were contained in the prior limitations shall not make the remainder to *Peter* to be contingent; then suppose the remainder to *Peter* were upon a contingency, when *Paul* died without issue male, his brothers then not being living, the contingency would have happened, and the estate of *Peter* ought then to vest: But put the case, that *Thomas* had died leaving a son, and *Paul* had then died without issue, the brothers of *Peter* then not being living; if such construction be made, that the estate of *Peter* then would have vested, violence would be done to the first words of the will, which give an estate to *Thomas* and the heirs male of his body; but the estate of *Thomas* did not determine during the life of his son, and yet the estate of *Peter* commenced during the life of the son of *Thomas*; if it was to commence when the contingency happened, so as to make the estate of *Peter* to commence upon a contingency, this would contradict the express limitation and words in the former part of the will. Besides, the intent of the testator appears to be, that the estate should continue in his name and posterity;

[64]

Limitations
shall not
take effect
contrary to
express in-
tent of de-
visor.

1 Lev. 11.

3 Lev. 341.

4 Mod. 282.

sterity ; and by such construction, as makes this to be a contingent remainder, it might happen that the heirs female, who are not of the name of the deviser, might inherit before the heirs male are extinct (for the limitation is to the heirs female in the last clause of the will) : As put the case ; *Peter* having a son and a daughter, *Paul* dies without issue, *Thomas* surviving, who afterwards dies without issue ; here the contingency does not happen ; for *Thomas* was alive when *Paul* died without issue, and so the limitation to *Peter* and his heirs male will never take effect, contrary to the express intent of the deviser.

And *HOLT*, C. J. cited *Cro. Car.* 185. *Spalding* and *Spalding*, which is an express authority in point ; there a man had three sons, and devised lands to *John* and the heirs of his body, after the death of A. and other lands to *William* and the heirs of his body, and other lands to *Thomas* and the heirs of his body ; and if *John* died during the life of A. then his land to go to *William*, &c. *John* did die in the lifetime of A. but left a son of his body ; and it was resolved, that *William* should not have the land ; because *John* did not die without issue ; for by the limitations to the other sons it appears that the deviser intended an estate-tail to all of them, and it was not to be construed a contingent remainder, or limitation to *John*, to abridge the express limitation to him of an estate-tail. So when a man devised his house after the death of his wife to his son, then as follows, " And if my three daughters, and either of them, over-live their mother and brother, and his heirs, then they to have it, and after them J. W. and R. W. &c." and whether this was a contingent estate, and whether it were performed, two of the daughters dying in the life-time of their brothers, were the question ? And it was resolved, that this was no limitation contingent, but shews when it shall commence. *1 Cro.* 185. *2 Cro.* 416.

[65]
2d question,
whether it
was an im-
mediate es-
tate vested
or executory ?

Devise to A.
B. a stran-
ger, dying
without is-

But an objection was made by *WRIGHT*, serjeant, that here was an executory devise to *Thomas* and his heirs male, to commence after the death of *John* without issue male, and therefore it is void ; for the limitation made by the testator is this, " After the death of my son *John* without heirs male of his body, &c." so that *Thomas* could have no estate until *John* was dead without issue male.

And it was agreed by the Court, that if a man seised in fee in possession devises his lands to another after the death of A. without issue, it is a void devise ; for the law will never

never expect such a remote contingency, as the death of another without issue, and therefore the devise upon such a contingency is void: But here is not an executory but a present devise; for *John Floyd*, the father was seised in fee of the reversion after the death of *John* his son without issue male, which reversion he had power to dispose of by his will; then as he devised that to *Thomas* and the heirs male of his body, after the death of *John* without issue male, such devise was an immediate devise, which was then vested in the devisee; and the words, "after the death of my son *John* without heirs male of his body," only shew when the devise shall take effect in possession. And he compared it to the case 10 Co. 107. A lease was made for ninety-nine years, if the lessee so long lived; and afterwards the lessor granted the land demised to another for life, *habendum* after the death, surrender or forfeiture of the lessee; this was adjudged a good grant for life, and the *habendum* only shewed when it was to come into possession.

It was also objected by *WRIGHT* serjeant, that here *John Floyd* the father had but an estate-tail, and so could not make a devise of it; for by the marriage settlement the estate was limited to *John* the elder for life, then to *John* the son for ninety-nine years determinable on his life, then to first, second and third son of *John* the son in tail male; then to *John* the son and the heirs male of his body; remainder to the right heirs of *John* the father; so *John* the father was seised for life, with a remainder to him in tail male, the remainder to him in fee, and by consequence the devise made by him was void.

And it was agreed by the Court, that if *John* the father had no more than a remainder in fee, his devise would be void; for he would have given no estate by the will, but what the devisees would have had by force of the estate-tail; for upon the death of *John* the son without issue male, by force of the estate limited to *John* the father in tail male, the land would descend to *Thomas* and the heirs male of his body, then to *Paul* and the heirs male of his body, then to *Peter* and the heirs male of his body, in the same manner as it is devised to them, and afterwards to the heirs general of the devisor; then they would not have taken by the will, but by descent. But in this case *John* the father had not the fee in him by way of remainder, but it was in him as his old reversion; then as he devised that to *Thomas* and the heirs male of his body, *Thomas* had an estate tail *hors* the reversion;

see is executory; otherwise if B. were tenant in tail, remainder to the devisor.
3 Cro. 323.
1 Roll Abr. 511.
Poph. 35.
4 Co. 30.
1 Salk 188.
2 Vern. 264.
2 Bac. Abr. 495.
2 Ld. Ray. 597.
1 Term. Rep. 466.

3d question, whether the entails devised were not such as could never take effect, and therefore void.

De Term S. Hill. 11 Will. 3.

A. having remainder in tail, with reversion in fee, devises to one Say in tail, remainder to the other in fee; good because it alters the tenure.

Yelv. 149.

1 Salk. 233.

11 Co. 70, b.

2 Black.

Com. 175.

Plowd. 27.

10 Co. 107.

1 Salk. 115.

264. 2 Bac.

reversion; for when a man creates an estate-tail, the tenant in tail holds of him in the reversion, who holdeth of the Lord Paramount; and therefore after this devise *John* the son should hold of *Thomas*; to whom the reversion was devised; and if the Lord avow, he ought to avow upon *Thomas* as his true tenant, and not upon *John*; and for the reason, that the devisor had the reversion in him, and not the remainder, the devise is good. And this diversity between a reversion and remainder is agreed 2 Co. 51. a. If there be tenant in tail, remainder in tail, and he in the remainder grants his estate during the life of the tenant in tail, the grant is void; for his grantee cannot have any benefit by it; but if there be tenant in tail, reversion in fee, and he in the reversion grants his estate during the life of the tenant in tail; this is good, for the grantee shall have the services which the tenant in tail ought to perform; but if the will could not stand with the rules of law, the recovery suffered by *John* the son, being to the same uses as the devise, will make the estate good to the lessor of the plaintiff. And therefore judgment was given for the plaintiff.*

*The judgment of the Court was, that it was a remainder vested in *Peter*; and this judgment was affirmed upon error, both in the Exchequer, and House of Lords. Judge Blencowe's MSS. Vol. I, fo. 139, 1 Salk. 232.

[67.] Gage and Acton. 9 Will. 3. rot. 293. In B. R. Case 42.

Vide 1 Salk.

325. S. C.

Where

marriage

shall dis-

charge a

bond to a

feme obli-

gee.

1 Salk. 325.

S. C.

Carth. 511.

S. C.

DEBT for rent against the defendant as administratrix due in the life-time of the intestate. The defendant pleaded, that the intestate in his life-time entered into an obligation to her of 2000l. when she was sole, which was not yet satisfied, and that she had not assets *prater*, &c. which she retained for the debt upon that obligation. And upon the whole the case appeared to be, that the intestate entered into an obligation to his wife *dum sola* in her own proper name; the condition of which was, that if the intestate, with whom a marriage was then intended by the defendant, should leave her worth at the time of his decease the sum of 1000l. in goods and chattels, or if his executors or administrators should pay her 1000l. within six months after

De Term. S. Hill. 11 Will. 3.

after his decease, then the obligation to be void. Afterwards the obligor and obligee intermarried, the husband died, and the wife took out administration; and to the action brought for rent on lease due from the intestate, the defendant pleaded retainer to satisfy this obligation. Cases B. R. 288. S. C. Holt 309. Lilly's Ent. 214.

The questions were two;

First, Whether an administrator could plead a retainer for debt upon a bond to an action of debt for rent?

Second, Whether the obligation was not discharged by the intermarriage of the obligor and the obligee?

As to the first question the whole court agreed, that an executor or administrator might plead a retainer for satisfaction of a debt on bond to an action of debt for rent, for they are of equal degree; and then a man may retain for the satisfaction of a debt due to himself against another debt not being of an higher nature; and so *e contra*, a man may retain a debt due for rent against an action for a debt on bond; but the case of *Godfrey and Newport*, 2 Ven. 481. is good law; for if an action be brought for rent due from a testator, the executor shall not plead a bond made by him not yet satisfied, nor *e contra*; for being of an equal degree, one cannot be a bar to the other; and in such case there is no difference between rent due upon a lease by parol and a lease by indenture; for in both cases the rent is of the same quality, and the one may be retained against a debt due upon bond, as well as the other. Vide the case Pas. 5 Ann. in C. B. between *Stonehouse and Ilford* accordant. 3 Lev. 267.

[68]

Salk. 409, 410.

As to the other point, it was resolved by TURTON and GOULD Justices, that the marriage in this case was not a discharge of the obligation

GOULD J. admitted, that the feme before marriage might have released the obligation; and that by the marriage she made a release or extinguishment of all present contracts to be performed *in futuro*, *in presenti*, or upon a contingency: But they said, that here was not any thing to be performed during the coverture; and the obligation could not be sued during the coverture, then the marriage must be only a suspension, and not an extinguishment of the debt due by virtue of the obligation; for it does not become due till after the death of the husband; the condition is parcel of the obligation, and by the condition it appears, that nothing is due until after the death of the husband, and the obligation cannot be put in suit until the condition is broken. 28 H. 8. 31. Besides, here it was the express intent of the parties,

Salk. 306.

Hob. 10.

Hutt. 128.

2 Lev. 73.

3 Kcb. 116.

F

that

that the obligation should be of force after the death of the husband; the marriage is mentioned in the condition, and *modus & conventio vincunt legem*. And this is not like the cases which make the marriage to be a release of a debt, and which are founded upon an absolute contract, for here the contract is qualified; and they relied upon the cases 26 H. 8. 7. b. If a man gives a bond to his wife when sole, and they marry, and are afterwards divorced; debt lies after the divorce. A man promises a woman, that if she survives him he will leave her 100l. and afterwards they intermarry, and the wife survives; she shall recover in *assumpsit* against the executor of the husband, for the law will not make a release against the intent of the parties; and the marriage, which was the cause, does not destroy the promise created by it. Hob. 24. b. Hutt. 17. And altho' HOBART differed in opinion, yet he agreed, that an obligation should be in the same case as a promise; and in case of such a promise, it was also resolved, that the marriage is not a release; and this was affirmed in the Exchequer-chamber. 2 Cro. 571. In every case marriage doth not release the action of the wife; for if a man marries the executrix of the obligee, the action is only suspended, not released, for after the death of the husband it revives.

[69]

But HOLT C. J. *contra* strongly; who said, that the other judges termed this a qualified contract, plainly contradicting the text of *Littleton*, who says, that an obligation with a condition future is *debitum in presenti*, tho' payable at a future day, and may be released by the words, "all demands;" and the words of the lien are in the present tense, *cognovit se teneri*, and not in the future, and for that reason the marriage is a release. For,

First, A man cannot be indebted to his wife.

Secondly, As by the condition the payment is not required during the coverture, yet an obligor may pay before the condition is forfeited; and the husband in such a case might pay the penalty in discharge of his obligation before the day, but he cannot pay it to his wife. 11 H. 4. 40.

Thirdly, marriage is an actual payment; for if a stranger was bound to the woman, payment to her after coverture would not have been lawful payment, but it ought to have been made to the husband.

Fourthly, The husband acquired it by the marriage; for if a stranger had been bound to the wife, the husband might have released it; and he said, that the cases cited do not

warrant

Dyer 6, 7.

Moor 236.

355.

Hob. 156.

2 Roll 407.

Litt. Rep.

87, 32.

1 Vent. 344.

2 Cro. 170.

1 Sid. 58,

79.

5 Co. 70, b.

Hutt. 12.

1 Cro. 373.

8 Co. 136.

1 Ill. 264,

b. 343, b.

Dyer 140.

Hutt. 171,

125.

1 Roll. 935,

940.

Yelv. 156,

160.

Palm. 99.

2 Cro. 222.

Swinn. 325,

300, 301.

De Term. S. Hill. 11 Will. 3.

warrant the contrary opinion; the marriage of the obligor with the executrix of the obligee is not a release, because she had it *in autre droit*, to the use of the testator; and for this reason if a man possessed of a term either as executor, or in right of his wife, purchases the inheritance, the term is not merged; otherwise if he were possessed of the term in his own right. Where the man and his wife were divorced, as the case was 26 H. 8. the marriage was avoided; and he said, that he agreed to the cases 2 Cro. 571. Hob. 216. But there is as much difference between those and the present case, as there is between a condition precedent and subsequent; for though the promise is made *in presenti*, yet the action or the duty thereupon is future and contingent, and until a breach happens no action or duty arises; but in an obligation the lien or duty is immediate; and if such a promise had been made by a stranger, the husband could not have released it, for no possibility of a duty was accruant to the husband. But if the wife had a future right, which by possibility might happen during the coverture, there the husband might release, because of such a possibility; and as to what was advanced, that the intent of the parties was accordant, the intent of the parties ought not to change the efficacy of lawful acts; therefore he was of opinion for the plaintiff. But the other judges for the defendant.

Brownl. 76.
Cro. Car.
313.
Co. Litt.
264, b.
Plowd. 184.
b. 186, a.
Hob. 10.
Went. 45.
1 Jones
345.
Br. Execu.
112.
Cro. El'z.
114, 150.
1 Leon. 320.
3 lft. 202
[70]

Termino Paschæ.

12 Will. III. in B. R.

Case 43. The King and The Inhabitants of Chalbury.

Order of removal not appealed from conclusive to all the world.

UPON A CERTIORARI the case appeared to be this : An order was made for the removal of a pauper by two Justices of *Warwickshire* to *Chalbury* in *Oxfordshire*, which parish did not appeal to the order, but obtained another order of two justices to remove the pauper from *Chalbury* to *Farringdon* in the county of *Berks* ; and now it was moved to quash the second order.

HOLT C. J. and GOULD were of opinion that the second order was ill, as thereby the party was removed to a new parish ; for *Chalbury* not appealing to the order made by the justices of *Warwickshire*, who sent the pauper to them as to the last place of settlement, is concluded from saying that *Farringdon* is the last place of settlement, for if it were, *Chalbury* would have the advantage of it upon the appeal.

TURTON doubted, and it was adjourned.

Case 44. Ashmede and Ranger. Trin 11 W. 3. rot. 752.
In B. R.

If a lord of a manor cut down trees where a copyholder may take them for repairs, trespass lieth.
2 Salk. 638.
S. C.
1 Ld. Raym.
55. S. C.

[72]

TRESPASS *quare clausum fregit & arbores succidit*. The defendant pleaded *son frank tenement* ; the plaintiff replied that the land was copyhold granted to him and his heirs in fee ; that by custom a copyholder shall have timber for repairs : that his tenement wanted to be repaired, and that there was not sufficient timber for repairs. To which it was demurred ; and NORTHEY argued that the Lord of a copyhold may cut down the trees without a custom allowing him so to do, for the copyholder is but a tenant at will, and cannot cut down trees but for necessary repairs, and consequently the Lord may cut them down, otherwise nobody can have the benefit of them. But in this case where the copyholder by custom may fell for repairs, if the Lord take so many trees as not to leave sufficient for repairs, perhaps an action of the case lies, but not trespass. But the Court thought

De Term. Pasch. 12 Will 3.

thought that the Lord could not without custom cut down the trees of his copyholder, and if he did so, Trespass would lie against him for it. Cases B. R. 378.
Holt 162.

*In this case on demurrer, **HOLT, C. J.** held that Cro. Eliz. was not law. See Cro. Eliz. 292, 499, 631. 11 Mod. 18. 12 Mod. 379. Gilb. Ten. 236. 1 Br. Abr. 485. Ld. Raym. 551. 3 Term Rep. 391, 746.

Clarke and Smith. In C. B.

Case 45.
Where the
same estate
is devised to

EJECTMENT. Upon not guilty pleaded a special verdict was found to this effect. A man seised in fee devises land to his wife for life, and after her decease to his next heir at law and to his or her heirs; provided such heir should pay 100l. to such person or persons as his wife by will or other legal writing should appoint, and his land should stand charged with the said 100l. The devisor dies, and left a daughter, who had one son and died. The wife dies without making any appointment to whom the 100l. should be paid; the son of the daughter enters and dies without issue; and the dispute was between the heir maternal of the son who brought the ejectment and the heir paternal who was the defendant (the son being dead without issue;) therefore whether the son took by the will, *i. e.* by purchase, or by descent, was the question. And it was resolved by the whole Court, that judgment should be for the plaintiff, for the heir took by descent, and not by the will; and it would be mischievous if every little legacy should alter the course of descent, upon which the heir might plead to the obligation of his ancestor *riens per descent*; and here the legatee would have had no prejudice, and the land was charged in the same manner as if construction were to be made that the heir should take by purchase, and the legatee would have the same remedy in Chancery.

a man
which he
would have
taken by
descent, he
shall be in
by descent,
notwith-
standing the
possibility
of a charge.
1 Salk. 241,
S. C.
Hob. 30.
Vaugh. 271.
2 Syd. 80.
Mod. Cases,
23.
1 Lutw. 193.
S. C.
Clift. 27.
Lev. Ent.
125.
Lex. Man.
149.
3 Lev. 127.
Salk. 423.
2 Lev. 60,
79.
Plowd. 545.
Owen 125.
148.

And **TREBY** Chief Justice said that this proviso makes [73] neither a condition nor a limitation, for the wife might make an appointment to a person not capable, and the intent was not that such person should have the land, for it is devised to the heir; and this resolution is warranted by the cases 1 Roll 626. 3 Leon. 64. And *Gilpin's* case 1 Cro. 161. That if a man devises land to his heir in fee upon a condition,

[73]
Mo. 593,
666.
Bendl. 68.
Cro. Car.
161.
Cro. Eliz.
313, 840.
1 Co. 105.
Mod. Cal.
tion, 23.

De Term. Pasch. 12 Will. 3.

1 Roll. 839. tion, his heir shall take by purchase, and the opinion 2
 2 Roll. 417. Mod. Rep. 286. by two judges, that if a man devises land
 See 1 to his heir, paying 20l. the heir shall take by the will and
 Strange 15. not by descent, is unintelligible and ill reported. For if a
 Ld. Raym. 205. man devises land to his heir charged with a rent issuing out
 Fitzg. 24. of it, the son shall take by descent. Judgment for the
 1 Bur. 42, plaintiff.
 45.
 2 Com.
 Dig 26. Powel on Dev. 363. 2 Str. 798. 804. Dyer 124, 371. 3 Leon. 70. Cro.
 Eliz. 833. 919. Mo. 644. Vaugh. 271. Hard. 204. 1 Ro. Abr. 626.

*†. See Clark against Day. Cro. El. 313. Leach's edition.

Term. Sanct. Trin.

12 Will. III. in B. R.

Anonymous.

Case 46.

A LATITAT was awarded against four defendants, who were arrested thereupon, and gave their appearances severally by different attorneys, and afterwards the plaintiff was nonsuited by every one of them severally, for not declaring against them in two terms, and 30s. costs awarded to every one of the four defendants; but it was held ill: For by Holt C. J. though the plaintiff might declare against them severally, yet as the writ was awarded against them jointly, and the plaintiff was nonsuited before any declaration, there ought to be but one nonsuit for all of them.

Plaintiff ought to pay the costs of one nonsuit only, where a latitat was awarded against the defendants, though they appeared severally by different attorneys,

where the nonsuit was for not declaring against them in two terms.

Day and Snelgrave. In B. R.

Case 47.

A PROHIBITION to the Admiralty was moved for, for that the libel there was against a ship for wages due to the master; and it was suggested, that the wages of the master accrue upon a contract within land. *NORTHEY contra*; That the master is but a mariner, and the ship is liable for his wages; and that no prohibition will lie for them in the case of a master, no more than in the case of the mariners; at least the party who prays a prohibition shall be compelled to give special bail to the action here. But the Court thought that a prohibition should go; for a libel there is allowable for the wages of the mariners only, and not of the master. Raym. 3. And if a prohibition ought to be granted *ex debito justitiæ* the Court will not compel the party to find special bail, if it is not consented to.

Prohibition shall go to the Admiralty in a suit for the wages of a master of a ship.

[?

Presgrave

Case 48.

Presgrave *and* ——. In B. R.

Special bail
need not be
given in an
information
or action
qui tam on
a penal sta-
tute.

IN an information or action upon a penal statute, brought by a person *qui tam*, &c. the defendant need not find special bail, if it is not upon the statute of 11 & 12 Will. 3. for an offence in the exportation of wool; and then not only the penalty, but the cause of action ought to appear in the writ, and the defendant ought not to be arrested upon a general *latitat* with an *ac etiam billæ*, &c.

Case 49.

Gregory *and* Walcup. In B. R.

Bill of ex-
change,
how it shall
be accepted.
1 Salk. 127,
129, S. C.
Cal. B. R.
410
Show. Rep.
319.
1 L. l. 234.
1 Vent. 45.

ACTION upon a bill of exchange; and the plaintiff declared, that one *Milburn* drew a bill of exchange upon *George Walcup* in London, to be paid to the plaintiff's order at double usance at *Amsterdam*, and the bill was dated the 26th of *October*, 1699, and by that the double usance expired the 26th of *December*, and by the custom of merchants the person upon whom a bill is drawn hath three days of grace for the payment in *England*; and eight days of grace in *Holland*. The bill was tendered to *Walcup* on the 30th of *December*, who accepted of it, by which he became liable; & *super hoc præd* (the defendant) *eisdem die & anno super se assumpsit quod ipse præd' denarios in eadem billa content' eidem G. bene solvere & contentare vellet secundum tenorem & effectum billæ præd'*. And it was moved that this was ill by Sir BARTH. SHOWER and DEE; for the bill was not tendered or accepted until the 30th of *December*, which was the last day for the payment; then as the defendant promised, as it was alledged, on the same day, according to the effect of the bill, it was a thing impossible, for the payment was to be at *Amsterdam*, which could not be on the same day, and therefore the plaintiff had not declared well; [76] for he ought to have said, that by the custom of merchants, if a bill was accepted, the acceptor obliged himself to make payment to the person who tendered it, &c. And,

Sir BARTH. SHOWER said, that it was proved at the trial by a public notary, that if a man accepts a bill payable at *Amsterdam*, he ought to assign a house where the money ought to be paid, otherwise it is not a good acceptance, but the bill may be protested; and if this bill had been tendered within the term of the double usance, and no house for the payment

payment at *Amsterdam* assigned, it might have been protested; but after the usances were expired, he doubted whether such protests could be made.

But it was said on the other side, and resolved by the court, that judgment should be for the plaintiff; for the allegation of any promise for payment was not needful, for the acceptance is an actual assumption, and the declaration need not alledge more; and altho' some house where the money ought to be paid at *Amsterdam* should be named, otherwise the party may protest the bill, yet if it is accepted, the acceptor becomes liable thereby.

And HOLT, C. J. said, that if a bill of exchange is drawn upon a man, who refuses it, a stranger may accept it, for the honour of the drawer, and by such acceptance he becomes liable.

And it was agreed in the same case, that a bill of exchange, payable to the order of a person, shall be paid to him or his order, for it is *tandamount*.

Dr. Groenvelt and Dr. Burwell and others, Censors Case 50.
of the College of Physicians.

ACTION for trespass in assault, battery, wounding, and false imprisonment.

The defendants, as to the beating and wounding, plead not guilty, and as to the residue of the trespass they justify; for that by letters patent dated the 23d of September, 10 H. 8. the King granted, that they, viz. the doctors of physic in London, should be a body and perpetual community, *per nomen Præsidentis & Collegii sive communitat' facultat' medicin' London, &c.* and that they might make bye-laws; *& quod quatuor singulis annis eligerent qui haberent scrutinium, correctionem & gubernationem omnium & singulorum dictæ civitatis medicorum & aliorum medicorum forinsecorum facultate illa utentium infra eandem civitatem & suburbia, ac infra septem milliaria in circuitu ejusdem, ac punitionem eorundem pro delictis suis in non bene exercendo, &c. per fines. amerciamenta & imprisonamentum corporum suorum;* and that these letters patent were confirmed by an act of Parliament of H. 8. And that the 1st of January 8 Will. 3. the plaintiff exercised the art of physic in London, and that he administered bad and unwholsome physic to one, and that the said woman and her husband complained to the defendants, being

Power of the censors of the college of physicians.

[77]
Carth. 491,
S. C.
Salk. 396.
S. C.
2 Ld. Ray.
230, S. C.
Salk. 144.
200, 263.
8 Co. 41,
60, b.
10 Co. 103,
2.
F. N. B.
73, b.
11 Co. 10,
14 43, b.

ing then the censors of the said college; upon which complaint the plaintiff was summoned before them, and upon examination they found him guilty in administering unwholesome physick, by means of which the said woman languished; and thereupon they fined the plaintiff 20l. and made a warrant under their hands and seals to ——— who was also a defendant, to take the plaintiff, who took him pursuant to such warrant, and conveyed him to prison, which is the residue of the trespass of which the plaintiff complains. The plaintiff replies *protestando*, that there are no such letters patent, and no such act of parliament; and *protestando*, that the plaintiff did not administer such unwholesome physic; that the defendants of their own wrong committed the trespass; *absque hoc quod*, that the plaintiff was taken and committed by force of the said warrant: And to this it was demurred. And this case was divers times argued, and many exceptions were taken to the plea and to the replication; and now this term judgment was given for the defendants. And,

[78] HOLT, C. J. delivered the opinion of the Court; and said, that the rest of the judges were agreed, that the replication of the plaintiff was ill, and that the plea of the defendants was good. The plaintiff in his replication traverses the taking by the warrant mentioned in the plea of the defendants; and this is ill both in substance and in form; for in point of form he ought not to traverse the taking by force of the warrant, but that there was not any such warrant; for if it were necessary that the arrest of the plaintiff should be by the same warrant that was mentioned before in the pleading, then, if the defendants had shewn in their plea another warrant than that which was shewn at the time of the arrest, the plaintiff ought not to have said, that he was not taken by this warrant, but that there was not any such warrant. But the replication is not good in point of substance; for the plaintiff seems to intend, that the warrant by which he was arrested was not a good warrant, for which reason he would take advantage of it: But admitting that the warrant upon which the plaintiff was arrested was unlawful, yet the plaintiff shall not have advantage of it, if there was another warrant which was lawful to take him at the same time; for if there are two warrants, the one lawful, and the other unlawful, and the party is taken upon the illegal warrant, yet he who apprehends him may justify himself by the authority of the legal warrant; and this appears by

by the case Mich. 34 Ed. 1. Fitz. Avowry, 232. cited 3 Co. 26. a. If a man takes a distress for a thing for which he had not good cause of distress, but had good cause of distress for another thing; if a replevin is brought, and he comes into court, he may avow for which thing he pleases.

Then when it is considered, whether the plea of the defendants was good; to which it had been objected that it was ill for the uncertainty; for the cause of the commitment being traversable ought to be alledged with certainty. Secondly, That by the plea it appears, that the plaintiff was fined and imprisoned also; the Censors (of the College of Physicians, the defendants) have authority to impose a fine, and to imprison for non-payment of that fine, or they may imprison for the offence; but they cannot both fine and imprison for the same offence, as in this case; for it does not appear that the imprisonment was for non-payment of the fine, but the plaintiff was both fined and imprisoned, and so was twice punished for one offence. Thirdly, The plea does not shew that the plaintiff was one of the College. Fourthly, The plea makes no answer to the assault; it does not shew that there was any assault, or set forth any justification of it.

But HOLT C. J. said, that the Court held the plea to be good, for it goes to the whole declaration; as to the battery and wounding the defendants plead Not guilty, as to the residue of the trespass they justify; and the residue of the trespass comprehends the assault, and every other part of the declaration to which the plea (of not guilty) does not extend: And there is no need that the plaintiff should be of the college; for it appears that he exercised his faculty within *London*, and the censors have jurisdiction within *London* and the suburbs, and seven miles in circumference; and it appears by the words of the charter, that the censors have power to punish by fine and imprisonment; and how they exercise that authority we do not inquire, as it will be apparent afterwards in the answer to the first objection, and which is the most material one. In answer to the first objection then, we say, First, That the cause of the commitment is not traversable. Secondly, If it were traversable, it is set forth with certainty enough. That the cause of commitment is not traversable appears by the authority which the censors have by the act of parliament: for by it they are constituted judges of fact, what is a male administration

Power of
fining and
imprison-
ment, &c. we
a court to
be of re-
cord.

10 Co. 103.

Dyer 221.

Pl. 31, 233.

Pl. 14, 32.

Or. 113.

Mort. 470.

1 R. 118. p.

37, 74.

2 Roll. Rep.

3.

Ch. Eliz.

251, 581.

Ch. Car.

567.

21 Edw. 4.

57.

[80]

17 Ad. Pl.

12.

7 Hen. 6.

11, b.

11 Co. 43.

b.

B. Det. 85.

Lect. 14.

36, Ley,

Gagen. 99.

17 Co. 43.

a. 44, a.

17 Co. 3.

Selden's

table, talk

Fines 61.

F. N. B.

73, 75, a.

8 Co. 119.

2 Brownl.

265.

Hard. 48a.

The act of

a judge is

not travers-

able.

Cro. Jac.

314.

2 Bullstr.

64.

The act of

an officer,

nistration (of medicines) and what is not : And they are judges of record, for they have authority to impose fine and imprisonment ; and when a new authority is constituted, with power to fine and imprison, the persons invested with such authority are judges of record ; for that very thing proves a court to be a court of record, viz. the power of fining or imprisoning ; for courts which are not of record can neither set a fine nor commit any one to prison. 8 Co. 38, b. And there it is proved, that the leet can impose a fine, because it is a court of record ; and forasmuch as the statute W. 2. 11. impowers the auditors to commit the accountant to prison, the auditors are thereby made judges of record : as is observed 10 Co. 10, 43. a. 2 Inst. 218. Then the censors being constituted judges of the matter, that which they have done as such they shall not be answerable for ; and that a judge shall not be answerable for an act done by him as a judge, appears by 12 Co. 24. and the cases there cited. True it is, that if a justice of peace issue his warrant to imprison the party, or to arrest him until such time as he can be brought before him, or if the commissioners of bankrupts commit a witness for refusing to be examined, it may be determined, in an action, whether they have pursued their authority or not ; for their act in this respect is only ministerial ; and the commitment is not intended as a punishment, but only as a mesne process to bring the party to justice, or to make him do his duty.— My Lord COKE, it is true, says in *Dr. Bonham's case*, 8 Co. 121. a. that the cause of commitment was traversable ; but this opinion was there given *obiter*, and was not essential to the case in judgment ; for there the question was, for practising without the license of the college, for which the party could not be imprisoned ; and *Dr. Bonham* being a Graduate in the University, my Lord COKE was carried away by his affection to his *alma mater* so far as to make a resolution in the present point, which was not in the case before him : But my Lord COKE says, that upon a conviction by the censors, they ought to make a record of it, which admits that they are judges of record ; and then by his own rule there in the case of a justice of peace who made a conviction of a force, and the cases in his other works, their acts (the acts of the justices of the peace) cannot be traversed ; and my Lord COKE does not cite any authority in support of his opinion, as to the point now before us. The reason which he gives why the party has no remedy

remedy by writ of error or otherwise, is of no weight: I grant that a writ of error lies not; for the censors having a new authority by a special act of parliament, and their proceedings being directed to be in a summary way, there is no need for them to pursue the forms and methods of other courts; and it is sufficient for them to make such summary proceeding as justices of the peace in many cases may do; yet the party is not without remedy; for he may have a *certiorari* to remove the record of conviction, and then it may be examined and reviewed, to see whether it be pursuant to their authority; for in every case, where a new jurisdiction is set up for a special purpose, this court by virtue of its original power may award a *mandamus* to make them put their authority in execution, and a *certiorari* to look into their proceeding, whether it be conformable to their authority or not. Thus a *certiorari* lies to remove an indictment for felony before the justices of peace, Cro. Eliz. 489. *Long's* case, to remove orders before commissioners of sewers, or by justices of the peace who have authority to make conviction of a force in their presence, or for deer stealing; but although no *certiorari* did lie in the present case it is not consequential that the cause of their commitment is traversable; for if the parliament intrusts them with a power so great that no act of theirs shall be reversed or reviewed, there is the less reason that their proceeding should be examined or traversed in an action; a jury is not finable for giving a verdict against evidence; and though there are many cases where jurymen have been fined, yet *Busbel's* case, in which all the others are cited, is sufficient to controul all the rest. 1 Vaug. 135. And if a juror shall not be fined or imprisoned or otherwise punished, for refusing to find a man guilty upon apparent and plain evidence, much less shall a judge be liable to censure. In the case of *Hammond* and *Powell*, P. 29 Car. 2. an action for false imprisonment was brought after the resolution in *Busbel's* case for his imprisonment, for *Hammond* was one of the same jury with *Busbel*,) and fined 40l. and imprisoned for it at the same time, and notwithstanding that the fine and imprisonment were illegal, yet it was adjudged that the action did not lie for false imprisonment against the judge or the officer; so a fine imposed by a judge of a court is not traversable as an amercement is. 7 H. 6. 13. a. As to the case between *Terry* and *Huntington*, Hard. 380. which may be objected, that is good law, for there an action was brought

as constable, committing for a breach of the peace, is traversable. Dyer 60. pl. 23, 69. pl. 29. March 8. 117, 118. Br. Fa. 4m. 8. 3 Salk. 265. S. C. Carth. 421. 491. Calce B. R. 245, 386. Holt 184. [81] 395, 536. Car. 19. Godh. 387. Hard. 478, 481. A convict whole attainer is saved by clergy, and not being a writ of error, but may move the indictment by *certiorari*. Raym. 433. 2 Hawk. 405. L. Ray. 459. 2 Bar. 1040. 1 Black. Rep. 213. 1 Black. Com. 375. 1 Vern. 170. 1 Mod. 184. 2 Mod. 218. Cause for which fine is set, is never traversable. Mod. Rep. 173. Hardr. 481. Judge not answerable

for error in judgment by action or indictment. Cart. 19. 9 Co. 68, a. Plowd. 13, 2. 1 Rol. Ab. 92. 3 Keb. 322. 1 Mod. 119, 147, &c. 2 Jones 13. [82] Hardr. 195. Cro. Car. 395. March. 8. 2 Bull. 64.

brought against the commissioners of excise, who had charged a man for the duty upon strong waters, where the liquor made by him was low wine of the first extraction, and the action well lay, for they had exceeded their jurisdiction; for low wines of the first extraction were not chargeable within the act of parliament; and as they had charged a duty upon a liquor not chargeable with it, they were not to be excused for having named it strong waters. If a justice of peace commits a man irregularly for being the father of a bastard child, no action lies against the justice if the man was the father of a bastard, otherwise if he had no bastard at all. So the case between *Nichols* and *Walker*, Cro. Car. 394, is good law, for there an inhabitant of *Tottridge* was charged to the poor of *Hatfield*; and the justices of peace have power to award a distress, where a person is assessed to the poor of the parish where he hath land or is an inhabitant; but where he is charged to the relief of another parish, there the case is beyond their jurisdiction. But if the cause of the commitment were traversable, yet the plea of the defendants here is good, for it shews with certainty in what the ill administration of the physic consisted, viz. in the use of unwholesome drugs: And although it is not said what drugs he used, it is no matter, for how shall we be informed whether he hath shewn them. In an action against a surgeon for an inartificial cure, the plaintiff does not shew what plaisters the defendant used. As to what hath been said, that the plea doth not shew for what malady the medicines were given, when the party had not any malady at all. And although it is not said that the witnesses upon whose testimony the fine was imposed were upon oath, yet the plea is sufficient; for it may be that it was not necessary that they should be sworn, or if it were needful, the omission of it is not such as will make their proceeding void. In such a special jurisdiction, in which the proceeding is to be in a summary manner, it is not needful to observe all the circumstances which are necessary in other legal proceedings. Judgment for the defendants. Vide 1 H. 6, 4.—47, E. 3, 50.

Case 51.

What words will make an estate-tail in a devise.

Nottingham and Jennings. In B. R.

EJECTMENT. And upon a special verdict, the case appeared to be as follows :

A man

De Term. S. Trin. 12 Will. 3.

A man seised of land in fee had issue three sons, *John*, ^{1 P. Will. 233, S. C.} *Francis* and *William*, and devises his lands to *Francis* and his heirs, and for default of heirs of *Francis* to the heirs of the devisor; and whether *Francis* had a fee-simple or an estate-tail, was the question; which *HOLT C. J.* who tried the cause, directed to be brought before the Court in respect of the case of *Hearn and Allen*, Cro. Car. 57. ^{1 Salk. 233, 1 Ld. Ray. 568, S. C. 2 Eq. cas. ab. 308, pl. 10.}

And it was objected by Mr. *CARTHEW*, that this case is stronger than the case of *Hearn and Allen*, and differs from the case of *Webb and Hering*, 2 Cro. 415. for in the present case after the devise to *Francis* there is no devise at all, for the limitation to the heirs of the devisor makes no devise to any person certain; for if it be intended that the eldest son shall take nothing, for he takes by descent. ^{[83] Vaugh. 269, 270.}

But it was answered by *NORTHEY*, and resolved by the Court, that the devise to *Francis* gives only an estate-tail. ^{3 Lev. 71. 1 Rol. rep. 398, 436. Cro. Jac. 428, 448. 1 Rol. Abr. 836. 3 Keb. 589.}

And, *HOLT C. J.* said, that such was the case of *Hearn and Allen*, which differs not from the present case, and if that case is good law, the devise here must give a fee-simple; but he was of opinion that the authority of that case was not great, being only upon the opinion of three judges against two, and it was contradicted by the case 2 Cro. 415. of *Webb and Hering*, which was stronger than the other; and that although the devise to the right heirs of the devisor passes no estate to the eldest son, who takes the reversion by descent, and not the remainder by purchase; yet it is sufficient to shew the intent of the devisor, that the words of the devise "To *Francis* and his heirs, and for want of such heirs", meant heirs of his body. And as the devisor says, That his own right heir shall take after the death of *Francis*, without heirs, although the devisor's right heir takes nothing by this devise, for he takes by descent; yet it appears that the testator intended that when *Francis* was dead without issue, the eldest son should take, and the word *heirs* cannot have any other construction but issue, because he could not die without an heir as long as the testator had an heir; and for that this case differs from the case where the limitation for default of heirs is made to a stranger, (this being made to one who is the heir of the devisor) judgment shall be for the plaintiff, who claimed under the right heir of the devisor. ^{2 P. Will. 369. 2 Eq. cas. ab. 305, pl. 2. Cas. Temp. Talb. 1. 1 Ver. 89. Dougl. 254.}

Parker

Surrender
of a copy-
hold to the
deputy of a
deputy
steward out
of court is
good.

1 Salk. 95.
S. C.
Called
there Par-
ker and
Kett.

1 Ld. Ray.
658. S. C.

A deputy
must possess
the whole
power of
his principal:
and
covenant or
condition to
restrain it is
void:

3 Salk. 124.
Holt 221.
Cases B. R.
466.

Agreement
with a de-
puty, de
facto, tho'
not deputy
de jure
good.

Dyer 238.
Moor 112.

5 Co. 17, b.
1 Co. 140.

Poph. 71.
2 L. v. 184.

9 Co. 49.
1 Salk. 95.

12 Mod.
467, 470,

690.
3 Bac. Abr.

741.
Cal. Temp.

Hard. 150.
Carth. 270.

1 Roll rep.
323, 393,

394.

EJECTMENT. In which upon a special verdict the case appeareth as followeth:

A man surrenders his copyhold to the use of his will, and this surrender was made out of court into the hands of a person who had a deputation *pro hac vice* from the deputy of Sir Samuel Keck, who was the steward of the manor; and afterwards makes his will, and devises this copyhold to his wife for life, &c. and whether this surrender to the use of his will, made to the deputy of a deputy steward out of court was good, was the question between the defendant, who was the devisee, and the heir at law, who was the lessor of the plaintiff. And it was urged by Mr. WELD for the plaintiff, that the deputy of a deputy had not any authority; for although a steward may make a deputy (the which point may be disputed since the case of the Earl of *Shrewsbury's* yet a deputation made by such a deputy is void, which was granted by *NORTHEY* on the other side. Then the question is, Whether the act of one who had not any authority shall be to the prejudice of a copyholder? And for this purpose he took a diversity between an act done by a man at the place of office, and an act done by a man in another place, and therefore agreed to the case, *Cro. Eliz.* 533. where an agreement at the Custom-house for merchandize imported with the deputy of a deputy was sufficient, because it was made at the Custom-house with one who officiated there. So if there are joint stewards by patent, and one of them holds the court and takes surrenders, &c. it is good; or where the clerk of a steward holds the court, &c. it is good, *Mod.* 112, for the acts are done in court, where the tenants are compellable to come and perform their services, and cannot examine the authority of the steward; but when a surrender is made out of court, the surrenderor takes upon himself the notice of the authority of the person who takes the surrender, and if he hath not any authority it shall be at the surrenderor's peril; and if a surrender is made to a sub-deputy, it is of no more effect than if it had been made to a mere stranger. And he said that of common right a man may make a surrender to the lord or his steward, and such act as the lord or his steward can do of right, he can do by attorney; according to the rule laid down, 9 Co. 75. *Combs's case*. A copyholder may make a surrender in court

De Term. S. Trin. 12 Will. 3.

court by attorney, so the lord or his steward may accept a surrender by deputy, who is *quasi* an attorney to the steward; but a surrender out of court cannot be made by attorney without a special custom, nor for the same reason can it be made out of court to a deputy steward without a custom to warrant it.

[85]
Godb. 389.
1 Roll 500.
1 Leon. 36.
Co. Lit. 59.
a.
Moor 70, 71.

NORTHEY on the other side said, that the place where the surrender is taken makes no diversity, for the thing to be considered is, whether it turns to the prejudice of the Lord, or not. A grant by a disseisor, or of one who hath not any right, is good upon a surrender, for the disseisee hath not any prejudice thereby; but voluntary grants (of a disseisor, &c.) are not good; so in the present case the lord hath not any disadvantage whether the surrender be made to the steward or his deputy, in court or out of court, and therefore the act of such deputy or of his sub-deputy shall not turn to the prejudice of the tenant, and there is no colour for a difference, be the act done in court or out of court, (though in the present case the surrender was taken within the manor, and the coming of a copyholder to make a surrender, makes *quasi* a court). And therefore he took the case Cro. Eliz. 533. to be a case in point, and the court inclined to be of the same opinion; *sed adjournatur*. And afterwards it was resolved that the surrender was good.

A deputy or attorney may act in his own name, or that of his principal.
1 Roll Abr. 330, 501.
9 Co. 76, b.
Godb. 389.
Moor 70,
71.
Dyer 251.
pi. 89.

The King and The Inhabitants of ——. In B. R. [86]
Case 53.

ORDER of two justices made for the removal of a man and his children, and removed hither by *certiorari*, was quashed; for the removal of a man and his family hath been adjudged uncertain, for the family may comprehend those who having another settlement ought not to be sent to the place where the master of it is settled; so in the present case the children ought to be removed to the place of their settlement, for they may have a settlement distinct from that of their father; and therefore the order to remove the children to the place of the last settlement of the father is ill.

Order of justices to remove a man and his family is ill.
2 Salk. 483,
528.
Farell. 54.
Comber.
478, 479.

The King and ——. In B. R. Case 54.

A CERTIORARI lies to remove an order made by the Justices of Peace concerning the repair of a bridge

A certiorari lies to remove an order of just.

De Term. S. Trin. 12 Will. 3.

ces of the and wear, pursuant to a private Act of Parliament; and the peace upon Justices ought to return the private act upon which their a private act order is founded. And a *certiorari* was granted accordingly of Pa. lia- by the Court. ment.

Cafe 55. The King v. Corporation of Rippon. In B. R.

An action BY THE COURT. An action lies against any of the mem- lies against bers of the corporation of *Rippon* in *Yorkshire* by their members of a corporati- private names, for a false return to a *mandamus* directed to on by their the corporation by their corporate name. And so, as private names for a *HOLT C. J.* said, it had been held in an action for a false return to a *Ma* return to a *mandamus* directed to the corporation of *Can-* damus by their *terbury*. corporate name.

[27]

Pett and Pett. In B. R.

Cafe 56.

There shall A MANDAMUS to the Spiritual Court was moved for, to be no repre- make distribution according to the statute 22 & 23 sen ation af- Car. 2. c. 10. and the case appeared to be this: A libel was ter brother: exhibited against the administrator, setting forth, that the and sisters the intestate had two brothers, who had issue and died; the children. the issue of one of the brothers had issue a son and a daughter, 1 P. Will. and then the intestate dies; and his grand nephew and grand 25. S. C. niece, the son and daughter of the issue of one of the bre- 1 Saik. 250. thers, wanted to have distribution with his niece, the issue S. C. of the other brother: But the Spiritual Court had denied 3 Saik. 138. it; for that there is a proviso in the Act of Parliament, S. C. that there shall be no representatives admitted after brothers 1 L. Raym. and sisters children; which occasioned the motion for a 571. S. C. *mandamus*. But it was denied, for the reasons given in the Cases B. R. last case of Raymond's Reports, 406. Prec. Chan. 28. 593. 409. 2 Vern. 168. & c cont'; & 1 P. Will. 594. 1 Vent. 414. Hol. 59. 325. 236, 237. Hales Hist. Com. Law. 213.

1 M d. 209. 2 Mod. 204. 2 Lev. 173. 2 Vent. 317. 3 Keb. 669. 2 Jo. 93. Style 174. All. 36. Moll. 316, 369. 1 Vern. 170. 2 Vern. 233.

Cafe 57. Rock and Layton. In B. R.

Judgment AN action against the Sheriff for a false return, and the against an declaration set forth, that an action was brought against admitt. a- the plaintiff as administratrix, and judgment by default. tor by con- The

The defendant [*scil.* in that cause] *pendente lite* confessed a judgment to another creditor, and satisfied that debt; yet the sheriff, upon a *feri facias* issuing upon the second judgment, returned, that he had assets to the value of the money paid upon the judgment confessed *pendente lite*; and for this return the present action against the sheriff was brought, supposing that this return was false, for the plaintiff had not assets sufficient in his hands, for that it was lawful for him to satisfy the first judgment; but here the sheriff took upon himself to adjudge a *devastavit*, by which practice the *scire fieri* inquiry will be taken away.

But by the Court the action lieth not, for the sheriff has done his duty; for when a judgment is given against an executor or administrator, it is given of all assets which he had at the time of the commencement of the action; and if an executor or administrator hath paid off a judgment *pendente lite*, it cannot be given in evidence upon *plene administravit* pleaded, for it ought to be pleaded specially; and if a judgment is ill pleaded, the executor subjects himself to the value of it; so if an executor hath assets to the value of 100l. and two actions are brought against him for 100l. a-piece, and judgment in both, he shall be charged to each judgment with assets of 100l. and shall be compelled to the payment of 200l. without possibility of avoiding it; so here the plaintiff had time to plead the satisfaction of the first judgment; and as he did not plead it, he is liable to answer for all the assets he had in her hands at the time when the action commenced, and the sheriff hath made a right return. And,

HOLT C. J. cited a case between *Gilbert and Clerk*, which is imperfectly reported in *Sid.* judgment against tenant in tail in debt, and a *scire facias* issued against the heir and the tertenants; and the issue was returned as tertenant, and a *scire feci* against him; upon which there was a judgment and an *elegit*; upon that a moiety of the estate-tail was extended, and the issue brought an ejectment: And it was resolved that he had no remedy, for he could not give the estate-tail in evidence, because he had had his time upon the *scire facias*; otherwise if the *scire facias* against the issue had been returned *nihil*.

Fisher and Wicks. In B. R.

Case 58.

EJECTMENT; and upon a special verdict the case appeared to be as follows: A man seised of copyhold lands to himself and his heirs, according to the custom of the

cession or default *pendente lite*, is an admission of assets, and he is estopped to say the contrary on a *devastavit* returned, and so is a jury.

1 Salk. 310,
314. S. C.
1 L. Raym.
589. S. C.
Lutw. 670.

[88]

Devastavit may be returned on *scire fac.* without inquiry.

1 Roll. Abr.
929 pl. 3.
6 Mod. 308.

Estoppel.

2 Sid. 70.

2 Cro. 323,
482.

1 Roll. Re.

450.

Dyer 57.

A copyhold estate surrendered to several, or the

qually to be the manor, having issue two sons and three daughters, sur-
divided, and renders it to the use of *Grace* his wife for life, remainder to
to their his five younger children to be *equally divided**, to them and
respective their respective heirs; and whether they were tenants in
heirs, is not common or jointenants was the question.

WILLIAMS argued, that they are tenants in common;
for so they would be in the case of a conveyance of a free-
hold; and *a fortiori* in case of a copyhold; and the judges
ought always to make such construction as will best support
the intent of the parties; and here the intent of the party
is manifest that they should be tenants in common; for the
words "*to be equally divided*," † divides the estate of the
grantor, and the words, "and their respective heirs," shew
the intent to be, that the inheritance should also be divided;
no particular form of words is necessary to make a tenancy
in common; if the intent appears to be, that the grantees
should take in common, it is sufficient. The diversity be-
tween the words "into three parts divided", and the words
"into three parts to be divided," is exploded; for when a
gift is made to any persons "equally to be divided," those
words make them tenants in common; the subsequent words
explain the first; as a bill of exchange payable to the use
of B. and C. equally to be divided, is not joint but several.
Cro. Eliz. 729. Those words in a will shall make a tenan-
cy in common, and words in the surrender of a copyhold
estate are construed favourably, as well as in a will; and he
cited *Stile* 434. 2 Vent. 365.

called Fisher
and Wigg.
1 Ld. Raym.
622. S. C.
Lilly's Ent.
205. S. C.
1 P. Will.
14. S. C.
12 Mod.
296.
3 Salk. 206.
Eq. ca. abr.
291.
1 Roll. Abr.
67.
2 Cro. 434.
Pop. 125.
1 Saund.
151.
Litt. sec 292.
3 Co. 39.
Cro. El. 52,
431, 443,
695.
Co. Litt. 66.
Cwp. 657.
Dig. 175.
Car. 75.

190. 2 Roll. Abr. 89. Yelv. 23. 6 Co. 16. b. Ld. Raym. 622, 625.
660. Stra. 17. 1 P. Will. 14, 19. 1 Eq. c. abr. 292. pl. 10. 2 Com.
1 Vent. 376. Cro. El. 696. 2 And. 17. Benl. 376. 8 Co. 189. Cro.
3 Salk. 206. Cases B. R. 296. Holt 369. Lill. Ent. 205. 2 Vent. 365.

BRODERICK *contra*; The words of the surrender are to
five children, which gives them a joint estate, and the sub-
sequent words "equally to be divided" do not make it se-

* The words "equally divided" go to the Quality of the estate and not to
the limitation; a joint estate may be altered in the habendum, Hob. 172. 1
Inst. 190. b. Cro Car. 75.

† In cases of wills, the words "equally to be divided" makes a tenancy
in common, 1 Atk. 493, 494. 2 Atk. 122. 3 Atk. 525. 1 Ver. 165.

So in deeds which receive their operation from the statute of uses, 2 Ver.
252. 3 Atk. 371. 1 P. Will. 347. Salk. 391, 227. Carn. 88, 92. 11
Mod. 296. 2 P. Will. 280. 3 Brown. P. c. 297. 4 Brown. P. c. 224. 1
Will. 165, 341.

Secus in common law conveyances, 1 Vez. 165. 2 Vez. 267.

veral,

De Term. S. Trin. 12 Will. 3.

veral, until a division be made; and the construction of surrenders ought to be according to the construction of other conveyances, and not according to the construction of wills. And he cited Stile 211. 2 Rol. 19, 60. Poph. 57. 2 Cro. 239. 5 Co. 119. Dyer 300. See more *postea* p. 92.

Harman and Ouden. In B. R.

Case 59.

ACTION upon the case upon an *assumpsit*, in which the plaintiff declared, that in consideration of 70l. paid by him to the defendant, the defendant assumed to deliver so many quarters of oatmeal at *Newhaven* aboard a vessel, to be there prepared by the plaintiff, on or before the 18th day of January next following; and it was assigned for breach, that the defendant did not deliver the quarters of oatmeal upon the said 18th day of January, at *Newhaven*, to his damage, &c. After a verdict for the plaintiff in the county of *Suffex*, it was moved in arrest of judgment, that here the breach was not well assigned; for the plaintiff laid in his declaration the promise to be to deliver the oatmeal on or before the 18th day of January, so that the defendant had liberty to tender or deliver it before that day, as well as at that day; the breach is, that the defendant did not deliver it at the day, but it is not said, that he did not deliver it before. But,

Assumpsit to deliver oatmeal on board a vessel (to be brought by the plaintiff) on or before the 18th of January; Breach, that he did not deliver up-

[90]

on the 18th is good after verdict.

1 Salk. 140. S. C.

1 L. Raym. 628. S. C.

12 Mod.

421. S. C.

Holt 127.

3 Lev. 293.

2 Vent. 221.

In what case

a tender before the day

is good.

Co Litt.

211. a.

10 Co. 129.

a.

Moor 122,

602.

8 Co. 92.

2 Bull. 144.

Yelv. 37.

Cro. Jac. 9.

Cro. El. 73.

13 Co. 2.

Roll. Rep,

273

5 Bac. ab. 9.

Ld. Raym.

621, 623.

HOLT C. J. gave the opinion of the Court, that the declaration was sufficient, for the 18th day of January was the proper day for the delivery; for if the defendant had tendered the quarters of oatmeal at any time before that day, and the plaintiff had not been there to accept of the tender, the tender had not been good; and in an action brought by plaintiff, the defendant cannot avoid the payment by such tender; and this appears by the case Cro. Eliz. 14. A man was bound by obligation to pay money on the 29th of September or before, and he tendered the money at the place on the 28th of September, the obligee not being there to receive it; and it was held by the Court, that the tender was not good; for it ought to have been made on the last day, viz. on the 29th of September. Here in the principal case the 18th day of January was the last day for the delivery, and the defendant could not make delivery or tender before that time to the plaintiff, if he were not present to accept; but if the plaintiff had been present at a day before, and had received

De Term. S. Trin. 12 Will.

Plowd. 172. received the oatmeal, yet the declaration is good after a ver-
12 Mod. dict; for the defendant might give such acceptance in evi-
421. dence, and then the issue would be for the defendant; but
when the issue is found for the plaintiff, the verdict aids the
declaration, and shews that there was no delivery at or be-
fore the 18th day of January; and for that purpose he cited
the case 2 Saund. *Peters* and *Opie*.

Case 60.

Hilliard and Jennings. In B. R.

Post. 94,
544.

[91]

A devisee
not a suffi-
cient wit-
ness to a
will, within
the statute
of frauds.

ACTION upon the case, upon a feigned issue directed
by the Court of Chancery, to try whether a devise of
lands in the county of *Somerset* was good. And upon a spe-
cial verdict the case appeared to be this: *Thomas Jennings*,
husband of the defendant, being seised in fee, by his will
dated the 27th of December 1679, devises in these words,
“ I give to my son *Thomas Jennings* my lands in *Somerset*-
“ shire, and to his heirs, and if my said son *Thomas* die with-
“ out issue of his body, or before his age of twenty one years,
“ I give the same lands to my two daughters, equally to be di-
“ vided, &c.” Afterwards the testator dies, leaving issue
Thomas his son and two daughters; the son attained the age
of twenty one years, and then made his will in writing,
which was executed in the presence of A. and B. and *Wil-*
liam Hilliard the plaintiff, and thereby devises the same lands
to *William Hilliard* the plaintiff, and afterwards dies with-
out issue.

CARTHEW for the plaintiff; insisted,

First, That *Thomas* the son had an estate in fee, which he
might devise.

Secondly, That the will was well executed, although the
plaintiff who claimed by the will was one of the witnesses
to it.

Moor 422.

1 Co. 85. b.

Cro. Jac.

22, 290.

415, 448.

Bridg. 1.

Yelv. 209.

1 Roll. Abr.

835.

Gilb. Dev.

34.

Raym. 453.

3 Bull. 195.

Salk. 233.

226.

And as to the first point he insisted, that the devise to
Thomas the son (by the father's will) and if he died without
issue, or before his age of twenty-one years, was an estate in
fee, and not in tail; for the word (or) ought to be taken
conjunctively as (and); and the words are tantamount, as if
he had said, “ If my son *Thomas* die without issue before
“ his age of twenty one years;” and it was resolved in the
case of *Sowle* and *Gerrard*, Mo. 422. Cro. El. 525. That
if a man devise to his son and his heirs, and if he dies be-
fore the age of twenty-one, or without issue, to B. the word
(or) shall be taken (and); and so in the present case.

As

De Term. S. Trin. 12 Will. 3.

As to the second point he insisted, that here are three credible witnesses according to the words of the statute; for although the plaintiff cannot be examined as a witness in his own cause, yet the will being proved by other witnesses, he is a credible witness to the will, although not in this cause; and there is a diversity between a person who is infamous and incapable to be a witness at all, and such a one who may be a witness, but in a particular case is not allowed to be examined in respect of his interest; and he insisted that the statute, which was made for the preventing of frauds and perjuries, ought to be expounded favourably, as in *Sir George Sheer's* case, where the witnesses [to a will] had subscribed their names in another room, and because the testator, if he had been raised in his bed, might have seen them through a glass-door, it was held an attesting in his presence. *Vide postea p. 94.*

Ld. Raym.
506, 568.
1 P. Will.
23.
1 Stra. 730.
2 Stra. 1125.
Cowp. 234.
410, 833.
Doug. 264,
321.
3 Term Re.
83, 84.

[92]

Fisher and Wigg. In B. R.

Case 61.

IT came afterwards for the opinion of the Court. And by *TURTON* and *GOULD* Justices, they are tenants in common as well as if the estate had been given by will, for a surrender is made to a use which hath as favourable a construction as a will, and the intent here seems to be, that the issue should take the estate in common, the profits to be equally divided; and there are not any prescript forms of words for making a joint-estate or an estate in common; but where the intent of the party appears to be for the one or for the other, such the estate shall be accordingly; and therefore if a man gives an estate to two, *habend'* one moiety to the one, and the other moiety to the other, this makes an estate in common. Co. Litt. And,

Vide ante
88.
1 P. Will.
15.
See reference ante
88.
2 Bulst. 274.
3 Cro. 323.
Poph. 125,
126.
Plowd. 151.
1 Saund.
151.
2 Vent. 365.

GOULD cited a case P. 32 Car. 2. between *Smith* and *Johnson*, where a man made a feoffment to two, equally to be divided, and to their heirs (which is the same case with that before us.) And,

SCROGGS C. J. and *DOLBIN* inclined to the opinion, that those words made an estate in common (and not a joint-estate) as well in a deed as in a will. But,

JONES J. was of a contrary opinion, that it was a joint-estate, and upon searching the roll it appears that no judgment was entered.

HOLT

De Term. S. Trin. 12 Will. 3.

3 Lev. 373. **HOLT C. J. *contra fortiter***, That they are joint-tenants, for the essential difference between joint-tenants and tenants in common is, that joint-tenants claim by one and the same title, and tenants in common by several titles; and here all the issues claim under the same surrender. True it is, that if a feoffment be made to two, *habendum* the one moiety to the one, and the other moiety to the other, the feoffees are tenants in common, for although they claim by one deed, yet they are in by several titles, for the livery must be several, and if livery were made to one *secundum formam & effectum chartæ*, the other would take nothing. Secondly, The words *equally to be divided* make nothing more than what was expressed before, for between joint-tenants the profits ought to be equally divided.

[93]
 Co. Ent. 413, 414.
 1 P. Will. 75.
 1 Vent 376.
 Moor 594.
 667.
 3 Leon. 113. 3 Co. 39. b. Br. Davie 29. Benl. 18, 19. 8 Co. 104.

But judgment was given according to the opinion of the other two judges. 1 Salk. 392. Vide 2 Vez. 257. which contradicts the ground of determination in 1 P. Will. 70. For the acknowledged authority of this case, see 1 P. Will. 341. Cowp. 660.

Cafe 62.

Hunt and Bourne. In B. R.

Fine levied of lands in antient demesne, what effect it will have. 1 Salk. 57. 244, 339. S. C. 3 Salk. 34. Their persons are free but not their estates. Holt 60. 255. Post. 124.

ERROR of a judgment in C. B. The case was this: A man seised of an estate-tail with remainder over of land in antient demesne, levies a fine in the Court of antient demesne for three lives on the 25th of May 22 Car. 1. according to the custom of the said manor, before A. the deputy of *Walter Earle*, steward, and R. attorney, and B. and S. attornies of C. a suitor in the same Court, in a plea of covenant *come ceo, &c.* to *Nurse* for life, rendering rent with warranty, and the jury found that this land had not been usually demised, and that the rent was not the customary rent; and afterwards the same tenant in tail levied a fine with a warranty 24 Car. 1. to the use of himself and his heirs, and afterwards bargained and sold the same land to *Pain* and his heirs, under whom the defendant claimed. The tenant in tail dies in 1663. *Nurse* dies in 1693, and *Richard Guillam*, the heir in tail of *Thomas Guillam* his grandfather who levied both the fines, enters, and whether his entry was lawful, or not, was the question.

And

De Term. S. Trin. 12 Will. 3.

And it was argued by EYRE, that the fine in antient demesne made a discontinuance of the estate-tail, of which the conusor of the fine was seised. By the common law a fine might be levied of land in antient demesne in the court of antient demesne, as well as a fine in C. B. might be levied of freehold land; and the statute 18 Ed. 1. *de modo levandi fines* does not alter the case, for that statute was only declarative of the common law; but by the statute *De donis conditionalibus* a fine of an estate-tail was declared null, after which a fine as well in antient demesne as in C. B. was not a bar but only a discontinuance until the 4th of H. 7. when a fine with proclamations was made a bar, but this statute of the 4th of H. 7. does not extend to fines in antient demesne; and therefore fines there as they do not make any bar, yet they make a discontinuance to the issue in tail; and so it was held 1 And. and it is not any objection that the court of antient demesne is not a court of record; as to the objection, that here if there be a discontinuance, it discontinues the fee, because a fine *sur consueance come ceo, &c.* conveys the fee without the word *heirs*, and I grant that the old books say so, but this is doubtful since the statute 18 Edw. 1. *de modo levandi fines*, since which statute there ought to be an *habendum* of the estate to the heirs in fines as well as in other feoffments and grants, &c. *Vide postea*, Co. Litt. 333. Jon. 210. Cro. Car. 152. Lat. 64, 72.

21 Hen. 8. 22, 23. Vide 10 Co. 97. b.

Almanzor *and* Davilak. In B. R. Case 63.

THE plaintiff was nonsuited for a fault in the declaration, and afterwards commenced a new action. And, HOLT C. J. said, that it had been ruled that the defendant in such case should be admitted to common bail.

ration, the defendant shall be admitted to common bail in a new action brought.

Hilliard *and* Jennings. In B. R. Case 64.

THE case above having been argued by CARTHEW for the plaintiff was now argued by PRATT Serj. on the other side; and he insisted, that *Thomas* the son took no more than an estate-tail by the will of his father; for the words "If my

fine in antient demesne makes a discontinuance. 1 Lutw. 770. [94] Antient demesne, and no other, is the same as de terra re-gis in do-m/day F. N. B. 98. a. Fitz. an antient demesne 12. There may be a discontinuance which turns the estate to a right and not take a way entry. Lut. 770, 782. Jones 209. Br. Dilcent 3. 1 Inf. 333. Co. 97. b.

Vide ante 90. A trust of inheritance must be demy vided in the

De Term. S. Trin. 12 Will. 3.

same man-
ner as a le-
gal estate.
2 P. Will.
258. 236.
A will made
beyond sea
[95]
of lands in
England
must have
three im-
presses.
Select Caf.
in Ch. 42.

my son die without issue of his body" make an estate-tail, and then the words "or under the age of twenty-one years" are restrictive, and make the estate-tail determinable on his death under that age; so that in either case the daughters ought to take; the word *or* is disjunctive in its proper signification, and ought not to be taken otherwise, where it is not necessary; and the case of *Sowle* and *Gerrard* allows that the son had an estate-tail: But to this point no opinion was given by the Court. And,

HOLT C. J. was not for allowing the case of *Sowle* and *Gerrard*; as to the other point he agreed, and it was held by the Court, that the will was not well executed, for the plaintiff was not a credible witness, as he himself was to take by the will; for the intent of the statute was to prevent any practice by persons interested in the obtaining of a will; and if he who is to take by a will may be a good witness, it will be an encouragement to such practice. But by the importunity of counsel it was adjourned*.

* Before the statute of frauds a will required but two witnesses.

By the stat. of frauds and perjuries 29 Car. 2. c. 3. 95. "All devises and bequests of any lands or tenements devisable by the stat. of wills, or by any particular custom, shall be in writing and signed by the party devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect." See 3 P. Will. 254. 2 Chanc. 109 3 Mod. 263. 5 Bac. Abr. 509. 1 P. Will. 239. 3 Lev. 1. 1 P. Will. 740. Prec. in Chanc. 185. 2 Sid. 109. Vin. Abr. tit. Evid. 14.

Devises, legatees and creditors are now competent witnesses to wills. Stat. 25 Geo. 2. c. 6. Except to their own devises, legacies, or debts.

Anfley and Dowling, 2 Strange 1253.

Wyndham and Chetwynd, 1 Burr. 414.

See Burn's Eccles. Law 532. for the arguments of counsel and cases cited. Doe on demise of Hindson v. Kerley.

Termino Paschæ.

13 Will. III. In B. R.

Blackborow and Davis.

Case 65.

A mandamus does not lie to the spiritual court after administration granted.

1 P. Will.
41, S. C.
1 Salk. 38,
251, S. C.
1 Ld. Ray.
684 S. C.
Cases B. R.
615, S. C.
Holt 43.
1 And. 303.
Owen 50.
1 Sid. 371.
Cro. Eliz.
460.

1 Roll. Abr.
303.
Moor 396,
336.
2 Lev. 90,
55
Raym. 224.
Brownl. 51.
Cro. Car.
62.
Style 10.
Latch. 67.
1 Lev. 186.

[97]

1 Woods
Con. 88.
2 Stra. 917.
Fitz. 202.
2 Peer Will.
578.
2 Atk. 285.
Ld. Raym.
684.
Palm. 412.
2 Jones 67.

A MOTION was made for a MANDAMUS to the spiritual Court after an administration granted to the grandmother, that another administration should be granted to the aunt, for by the statute of 21 H. 8 the spiritual court ought to grant it to the next of kin, and if it is granted to another the grant is void, and this Court hath power to direct and command it to be granted to the person who by our law is next of kin, and she is the aunt and not the grandmother; as to the objection, that there may be an appeal, that is no cause why a *mandamus* shall not go to the spiritual court; for if the temporal court will not grant one, after an administration is granted there, the statute will be eluded, for an administration will be granted on an appeal, before a motion can be made for a *mandamus*.

But the Court was of a contrary opinion, for by the statute of 31 Ed. 3. Administration shall be granted to such person as the ordinary pleases; then the statute of 21 H. 8. requires to make grant of the administration to the wife or to the next of kin who requires it; but if the ordinary does not grant it to the next of kin, but to a mere stranger, yet the administration is not void, but was good upon the statute of 31 Ed. 3. and therefore if an administration be repealed upon a citation, the acts by the first administration are good. 6 Co. 18, 19, *Packman's case*. But those acts could not be good, if the grant to a man not of the next of kin was absolutely void, and therefore the remedy for the plaintiff is by appeal; and if fourteen days elapse by citation or before administration, if the ordinary proceeds to grant it to an improper person, a prohibition shall be granted. And,

HOLT C. J. cited a case of Sir *George Sands*, if administration be granted to the next of kin of the husband, the wife cannot repeal it, but if it is granted to the next of kin to the wife, the husband may repeal it. *Vide postea*, 108.

3 Bullstr. 73. 1 Rol. Rep. 226. 2 Eq. cases abr. 242, pl. 7. 1 Co. 21, b. 3 Kcb. 282.

The

De Term. Pasch. 13 Will. 3.

Case 66. The King and The Inhabitants of Gravesend.
In B. R.

AMOTION was made to quash an order of sessions. First, Because an order was made by two justices to send *J. Goodberry* from *Gravesend* to *Lawton* her master in *Chadwell*, (with whom she was hired as a servant for a year) until she should be discharged; and afterwards the 21st of November, (the first order being made the 6th of November, by the justices of *Gravesend*,) another order was made by two justices of the county of *Essex*, to send the same person from the parish of *Chadwell* to the parish of *Gravesend*; and it was insisted that the second order was ill, being made before any appeal from the first order, or discharged from the service. *Sed non allocatur*; For the first order was to send the person to her master, from which order no appeal lies, and not to send her to the parish of *Chadwell* as the place of her settlement.

Secondly, It was objected that the second order was ill, for that the words are, "*These are to order you to remove J. Goodberry to the parish of Gravesend, and to deliver her, &c. there to be provided for according to law, unless she be able to provide for herself,*" and these last words refer to all the ordering part, and make the order conditional; and so if she was not able to provide for herself, she ought to be removed, and if she was, she ought not to be removed. *Sed non allocatur*; for those words are only explanatory of the former words, when she ought to be provided for.

[98]
Case 67.

It is sufficient to maintain an assumpsit, if the consideration was a benefit to the defendant, or a prejudice to the plaintiff.

Thorpe and Thorpe. In B. R.

ERROR of a judgment in the Common Pleas in *assumpsit*, in which the plaintiff declared, and set forth an agreement that he was to release the equity of redemption to a certain copyhold estate, upon which the defendant agreed to the payment of seven pounds, and although the plaintiff had performed his part of the agreement, yet the defendant had not paid, &c.

The defendant pleaded the release of the equity, in which were general words of release of *all demands*, in bar, and errors assigned were,

First,

De Term. Pasch. 13 Will. 3.

First, An equity of redemption is not valuable, being a thing that is only in Chancery, and of which the common law takes no notice.

Secondly, That the plaintiff ought to shew how he was intitled to the equity of redemption, for it may be that he hath an equity, and yet the release of it be of no value, although it were true that generally an equity is valuable; and this case is like the case of *Barber and Fox*, 2 Saund. 134, 136. *Assumpsit* against an heir upon a promise to pay a debt due by bond from his father, held ill, because it was not shewn that the heir was bound by the obligation, which shall not be intended so. Stile 245.

Thirdly, That this release of the equity of redemption, having words in it sufficient to discharge the promise, may be pleaded in bar to an *assumpsit* founded upon the promise, because this action is not founded upon the making of the release, but upon a promise to do another thing, and so it appears Mar. 75. Hob. 48. Cro. Eliz. 303, 703, 889. And if the action is not founded upon the mutual promise, but upon the making of the release, then it ought to be averred that the plaintiff had made a release; and it is not sufficient to say that he had performed all on his part, as appears by the reason of the case in Cro. Car. 19.

But it was objected, that the general words of the release, which was intended for a particular purpose, viz. to release the equity of redemption, shall be restrained to the subject matter.

Mr. COOPER answered, that it is true where the words are all in one sentence, as in the cases cited, it shall be so. But here are different clauses, for first he releases his equity; and then begins another sentence, "I do also release all other actions, demands, &c."

To the first error assigned it was answered, That an equity of redemption is within the notice of the court, which takes consufance of trusts and other acts.

To the second error, That if it do not appear that it, the equity of redemption, is not valuable, it shall not be intended; the cases of a surrender of a lease at will, &c. are of things apparently of no value, and therefore they make no consideration; but it is sufficient to maintain an *assumpsit* if the consideration was a benefit to him that was the defendant, or be of any trouble or prejudice to the plaintiff. And by,

HOLT,

1 Salk 171.
S. C.

1 Ld. Ray.

235. S. C.

1 Ld. Ray.

662.

5 Co. 70.

Condition

precedent.

Lut. 249.

2 Keb. 674.

Mod. Ca.

&c. 42.

1 Lut. 245.

1 Mod. 64.

Nell. L. 75.

2 Mod. 33.

1 Sid. 464.

Cal. B. R.

455.

2 Saund.

155, 156.

Holt 28, 96.

1 Term.

Rep. 447:

Release of an equity of redemption, a valuable consideration. **HOLT, C. J.** the release of an equity of redemption is a valuable and a good consideration for an *assumpsit*; then if the thing done is good, considerable and valuable, the promise to do it is a sufficient consideration, for although this action is founded upon the promise, yet an act to be done pursuant to such promise is the ground of the assumption; as where a man promises to deliver a horse, and another promises 20l. the 20l. is to be paid for the horse, and the delivery of the horse is to be presumed pursuant to the promise.

And as to the declaration, if a man covenants to do several things, and alleges performance generally on his part, though he ought to have alleged the performance of several things, yet this is aided by the appearance and plea of the defendant. *Sed adjournatur*. Afterwards the judgment was affirmed.

515. **Lut. 245.** **Salk. 113.** **Hob. 41, 42.**

[100]

Case 68. *Lane ver. Cotton and Sir Thomas Franklin.* In B. R.

Case of the post-master general for exchequer-bills lost out of a letter delivered at the post-office in London. **ACTION** upon the Case; the plaintiff declares upon the statute of 12 Car. 2. c. 35, by which the post-office is erected, and "one master appointed by the King under his letters patent, called the post-master general who and his deputy shall appoint posts for all letters"; that 26 May 17 Car. 2. by letters patent the post office was erected; that by patent bearing date the first year of W. & M. the office of post-master general was granted to the defendants, with all profits, &c. with a fee of 1500l. per ann. to be paid by the King; that the plaintiff inclosed exchequer-bills in a letter directed to *James Jones at Worcester*, and delivered the letter to the defendants in office, &c.

Upon Not guilty pleaded a special verdict was found to this effect: That there was such an act of 12 Car. 2. as was set forth in the declaration; that a post-office was erected between *London* and *Worcester*; that a grant of the office of post master general was made to the defendants, as was set forth in the declaration, with a clause that they should not be charged by the default of a deputy or other person, but only by their own default; that such letter, as was set forth with Exchequer-bills inclosed, was delivered to — an under agent at the post-office, and was there opened, and the bills taken out, and if, &c. for the plaintiff, &c.

GOULD,

De Term. Pasch. 13 Will. 3.

GOULD, J. was of opinion, that judgment ought to go for the defendants.

First, from the nature of the office, which was for the carrying of letters; and then, if the case is considered in parts, I hold, that for the miscarriage of a letter only an action will not lie, for the damage is not of any value; but if there should be any special damage by miscarriage of a letter, I determine nothing.

Secondly, if an action will lie, it must be in consideration of a contract, express or implied; no express contract is alledged. and no contract can be implied; for the office was erected by act of parliament, and by the words of the act a trust is reposed in the deputies, &c. by which it appears, that the intent of the act was not to make the post-master general chargeable; and therefore if the post-master dies the office continues, which shews that the office does not depend upon the post-master; and who shall be charged if such an accident happens in the time of a vacancy? [101]

Thirdly, Here the King is the head and principal of the office; all the ministerial part is intrusted with the post-master, his deputies and agents, but all the profits and revenue appertains to the king; by the paragraph of this act the penalty upon carriers, &c. who carry the letters is to be divided between the king and the informer. So in paragraph 6.

Fourthly, In this case it is impracticable to take care of all the agents, and impossible to take care for the security of those agents who travel by night and by day, and out of the kingdom; and the case of *Morse* and *Slue* goes upon this reason, that the master of a ship may take security and sufficient care of all under his command; In the case of an inn keeper, 8 Co. the hostler is answerable when the goods

are purloined within the inn, but not if they are sent abroad; as a horse to pasture, &c. for then the innkeeper cannot secure himself. A factor is not subject to account for goods purloined. As to the case of *Morse* and *Slue*, 1 Vent. 190, 238, where it was resolved, that a master of a ship was liable for goods taken out of a ship in port, it was for three reasons. First, He receives part of his wages and salary by contract. Secondly, He is the person known by the law, for he may pawn the ship. Thirdly, he may make a special contract, and caution for the carriage; but all these reasons fail in the present case. But if the post master general were generally chargeable, yet he is not

[102] so in the present case ; for the delivery of Exchequer-bills is a matter out of his province, and the servant ought not to have received them ; he was not intrusted for that purpose, and by consequence the master is not liable ; and it is found by the special verdict, that he was intrusted for the carriage of letters, and not for that of other things.

Powys, J. Post-masters before the statute of 12 Car. 2. who of their own heads set up posts, were liable as common carriers, if letters which they carried miscarried ; for it was a voluntary undertaking of their own, tho' the premium was of little value ; and this is agreeable to the reason of *Southcot's* case, 4 Co. 84. a.

Denied to
be law.
Post. 134,
& 2.
Ld. Raym.
909.

But I am of opinion, that in this case the action does not lie against the defendants. I admit, that Exchequer-bills are not properly treasure, nor different from other bills, but in circumstances which encourage their currency, but do not compel it : and the verdict finds only that the plaintiff was possessed of eight bills of credit : but if they were treasure I do not see any diversity ; for by the statute all packets are to be carried without distinction, the words are, " Every packet of letters and other things so much per ounce " ; so that if a man sends gold, jewels or other treasure, I apprehend that such packet is of the same nature with a packet of letters.

[103] Then it is to be considered, whether the defendants in this case are liable without their actual default, by the neglect of their agents, (for on an actual neglect or default in the defendants themselves I hold that they are liable ;) but here the verdict finds, that the bills were taken by a person unknown, and therefore I am of opinion that the defendants are not liable. The statute doth not directly charge them, and yet the rates of letters and packets are fixed, and the post-master cannot alter them ; but before the statute he might have fixed what rates he pleased. The letters are received in the night of persons unknown, delivered out to boys, who cannot give sufficient security ; they must, as it happens, be carried by the post on the Sunday, when the county cannot be sued if the mail be robbed ; they must be carried to parts out of the realm ; the statute says nothing of the value of things to be carried, it takes notice of the quantity and weight, but not of the value ; which shews, that the legislature did not intend that parcels of great value should be conveyed by the post ; and if such an action as this were to be allowed the office would be destroyed.

Then

De Term. Pasch. 13 Will. 3.

Then the principal point to be considered is, whether the post-master shall be chargeable for a mismanagement in the office; and I am of opinion that he ought not; for by the letters patent by which the office is granted to the defendants it is provided, that they shall not be liable but for their own default; for they are not officers for their own benefit, but for the benefit of the king; the defendants are only allowed a salary, and are obliged to manage the office according to the instructions which they from time to time receive from the king; the security taken by them of inferior officers is taken in the name and for the use of the king; and the wages of those inferior agents are paid by the king, and limited by the commissioners of the treasury.

If it is objected, that in this case a wrong is done without a remedy; it is frequent that damage happens where a man cannot come at remedy. The verdict says, that the damage was done by a person unknown; if the person were known, no doubt an action on the case will lie against him.

TURTON J. The action lieth not against the defendants; for the post-master general is not liable for the default of his officers and under agents: for this is not an ancient office, as appears Latch. 81. and if it is a new office, it is not within the reason of the ancient offices; and this case differs from the cases of the same nature in most of the circumstances mentioned before: And further, Exchequer-bills are now made a species of the money of *England*, which was never intended to be conveyed by the post.

HOLT C. J. This is the case: Sir Robert Cotton and Sir Thomas Franklyn are constituted post-masters general by letters patent of the 3d of May, the 3d of Will. & Mary, pursuant to the statute of 12 Car. 2. and thereby have power to make deputies, &c. but are and ought to pursue directions received, &c. and have a salary limited, &c.

Upon which case I hold that an action lieth for the plaintiff; I do not deliver my opinion, whether an action lieth when a letter is lost upon the road, for that differs much from the present case: But the reason upon which I rely in the present case is, that by the statute of 12 Car. 2. a special trust is reposed in the post-master general for the safeguard of letters; the statute extends the benefit of the subject in the safe and speedy conveyance of them.

Secondly, The office is erected in a certain place, viz. in London.

H

Thirdly,

De Term. Pasch. 13 Will. 3.

Thirdly, The post-master general hath the general care and government of the whole office committed to him, all others are his deputies; and this office differs nothing from the office of marshal of the king's bench, or those of other officers. 23 H. 6. A gaoler is chargeable for an escape, altho' the prison be broke open by rebels. and this even in the case of prisoners for debt, in which the statute gives a *capias*, and where there was no imprisonment by common law; as appears by 3 Co. 12. Sir W. Herbert's case.

Here is a consideration, and hire paid by the subject for letters carried; and that is the foundation of the charge upon an inn-keeper. 2 Co. 70, 188. But if goods are left at the inn by a stranger, not a guest, he is not liable, for there accrues no benefit to him; but for a horse left in the livery stable he is liable; and so in the case of a hoyman. Hob. 8.

I do not allow any difference between an office constituted by statute, and one at common law, for without doubt an officer shall be charged in the one case, as well as in the other; and this without contract express or implied: But it is objected, that the post-master hath not any benefit by the carriage; I answer, that the party pays a premium, and that is the reason why he shall have a remedy, which cannot be but by the general officer. But here the post-master general hath a benefit, for he hath a salary of 1500l. a year, and that out of the profits of the office, and therefore this case is like the case of *Morse* and *Slue*, 1 Vent. 190. of a master of a ship, and it is there said that the master of a ship, may refuse to take the goods aboard till the time of the voyage; so may a common carrier until the time of his setting out, but if he takes them into the warehouse before, he shall be charged.

This case is founded upon the same reason with all the other cases of the same nature, viz. of a carrier, hostler, &c. who are not charged unjustly, but with the highest equity, viz. because of the impossibility of the proof of a special damage, for a carrier may be confederate with evil persons, and the proof of such confederacy will be impossible, and therefore by the law of all nations, a man in such cases shall be charged, and whenever, our law agrees with the civil law, it shall be intended to be founded on the same reason.

But it is said that a carrier robbed may sue the county, but this is by the statute of Winchester, 13 Edw. 1. and

13 H. 4. 1.
H.b. 61.
17 Ed. 3.
58, pl. 44.
17 Ed. 3.
73, pl. 105

8 Co. 32.
Calve's
case.
1 Roll. 3, E.
4.
2 Brown.
254.
Hardr. 53.
Sid. 71.

[105]

De Term. Pasch. 13 Will. 3.

an action lay against the carrier before by the common law.

It is objected that an inn-keeper hath servants to watch in his house all night; so may the post-master general; but then it is objected, that the post-master manages his office by night, and this is used as an argument in excuse of the post-master, which is an argument for the charge upon an inn-keeper.

But although I compare this case to the case of a common carrier, yet it is not said by me, that the post-master shall be charged for miscarriage upon the road, for I give no opinion in such a case) and there is much diversity, for a carrier is bound safely to keep, and safely to carry, but the post-master is bound safely to keep, not to carry but to send. So in the case of *Morse* and *Shue*, it was agreed that the master of a ship shall not be charged, nor an inn-keeper for a horse sent to pasture; but if a man orders the hostler to send his horse to pasture when he is cool, and before that he is stolen, the inn-keeper shall be charged.

The post-master cannot refuse the acceptance of a thing which is proper for his carriage, but an action lieth against him for such refusal, as well as against a smith for refusing to shoe a horse.

Then exchequer-bills are proper to be sent by the post as well as bills of exchange, and the statute doth not restrain the post-master to the carriage of any thing in particular.

It hath been objected that Exchequer-bills have been instituted since the statute of 12 Car. 2. but if they are proper to be sent by the post, though they are newly created, they are within the statute made before, as in 4 Co. 4 b. *Vernon's* case. A devise to a wife for a jointure by force of the statute of 32 H. 8. is a good jointure within the statute of 23 H. 8. made before.

With the same reason it may be said that trover does not lie for exchequer-bills taken from the possession of one by another and converted, as that exchequer-bills are not to be carried within the statute of 12 Car. 2. Bills of exchange payable to bearer are good bills, and ought to be paid, but bills payable to order are for the convenience of indorsement, for every indorser becomes liable.

It is objected that nothing is to be paid for a bill of exchange, and therefore the post-master is not liable for it; but payment is made for the letter which incloses the bill of

DeQor &
Stud. p. 270.
Dial. 2. c.
38.
1 Vent. 238.
1 Will. 281.
Co. Lit. 89.
Ld. Raym.
909.
Fitz. Abr.
Process 35.
Br. 281.
ur la case,
pl. 67.
Carth. 458.
[106]
Roll. rep.
63.
Moor 135.
Allen 93.
Owen 57.
2 Black. rep.
916.
4 Burr.
2298.
An act
made of
late time
shall be
within the
equity of an
act made
long time
before.
Plowd. 127,
a. 82, b
2 Inst. 35,
322.
2 Brownl.
115.
1 Jores 188,
381.
Cro. Eliz.
177.
Saik. 444.

[107]

exchange, although it is not enlarged in respect of the bill, and the letter shall be intended to be in respect of the bill, a guest pays nothing for the custody of his goods, but the inn-keeper shall be charged for them, in respect of the benefit which he hath for the diet of his guest; or if the post-master hath no benefit for bills of exchange, yet being a public officer intrusted with them, he shall be charged for the negligent custody of them; it is granted that a post-master before the statute of 12 Car. 2. was chargeable with the miscarriage of letters or goods. Then that statute does not alter the nature of the office, but only confines the carriage of letters to certain special persons; as before the act of parliament he was liable, and now that act obliges all persons to send by the post master, shall the subject by the same act be ousted of his remedy?

Another objection is, That an action may be brought against the sub-agents, but for neglect the principal must answer for his inferior officers.

11a d. 53.
Sid 71.

The post-master hath the whole management of the office; if he makes a deputy, although for life, he may turn him out. Mo. 556. 39 H. 6, 1. He hath the sole power to make and turn out his deputies, and therefore must answer for his deputies and all his officers.

Deputy
chargeable
as a wrong
doer.
2 Cro. 330.
H b. 11.
Malloy
209.
3 Lev. 259.
3 M. d. 321.
Moore 462.
Pett. 152.

Another objection is, That they are all but fellow servants and all receive their salaries of the king, but they are retained by the post-master and under his command, and then they are his servants; but suppose it granted that they are not the servants of the post-master, then the case will be, that the defendants who are intrusted by virtue of an act of parliament with the management of an office, employ persons in that office who are not their servants, and who imbezil goods brought thither, and then the defendants must be answerable for them.

Act of de-
puty may
fasten li-
ability on
principal.
1 Lev. 69.
1 Vent. 190.
Raym. 220.
1 M. d. 85.

Another objection is, That the act of parliament of 12 Car. 2. never intended that the post-master general should be answerable for the neglect of his deputies and servants; but that does not appear, and is only *gratis dictum*, and it seems to me that the act of parliament did intend it, for when an act of parliament makes a new officer, and intrusts him with the property of the subject, it is to be presumed that the act of parliament intends to make him chargeable as other officers of the same nature are; and the statute says that he is constituted for the safe dispatch of letters; and by another clause it appears that the act of parliament intended

intended to make him answerable for his servants and deputies, for it is provided that the post-master and his substitutes shall provide post-horses, &c. and for default the post master shall pay 5l. &c. the post-master, without mention of his deputies. [108]

Another objection is, that the office by this means will be destroyed; but ought we to preserve the office to the prejudice of the subject? the office will be more careful, and if it takes sufficient care it cannot be destroyed.

Another objection is, that exchequer-bills may be sent by another way; but a man has a right to make his election by which way he will send them: Shall an inn-keeper answer for goods stolen in his inn, when the guest might have been entertained in another inn? Certainly he shall; but exchequer bills cannot be sent by any other way with so much speed.

It hath been asked by way of objection, shall the post-master be answerable, for things of great value, when he hath so small a premium? Certainly he shall, if he is charged by the law, and he accepts of the office upon such terms. Another objection is, that the patent of the defendants says, that they shall not be answerable for their substitutes in any default, but only for their own proper neglect; but this clause regards only the imbezilment of the revenue. And yet judgment was given by the opinion of the three judges for the defendants,

Blackborow and Davies. In B. R.

Case 69.

IT was now urged, that the grandmother was in equal degree with the aunt; and so thought the court; for the mother is nearer of blood than the brother, (and therefore the statute of 1 Jac. 2. c. 17. was made to give distribution to the brother with the mother) and by consequence the grandmother is in equal degree with the aunt; the descent to an uncle is not immediate, but mediate, and the pleading of such a descent ought to shew how he is his heir. And the *mandamus* was denied by the whole Court.

Vide ante
96 Vide
Stats. 22 &
23. Car. 2.
c. 10.
29 Car. 2,
c. 3.
14 Geo. 2,
c. 20.
2 Lev. 55,
56.
1 Vent. 324.
1 Lev. 186,
Hale Hist. Com. Law,

187. 1 Saik. 38, 251. Prec. Chan. 527. 1 P. Will. 49, 64. Hale Hist. Com. Law,
209, 213, 220.

The

The King *and* Eller. In B. R.

[109]

Case 70.

When the court will not hear any argument about the plea on a demurrer before the trial of the issue.

INFORMATION against the defendant for counterfeiting several receipts of several persons, to whom sums of money were due out of the Exchequer, by means of which receipts he, without the privity of the persons to whom the money was due, did receive the sums aforesaid. The defendant, as to the counterfeiting of the receipts or knowing them to be counterfeit, pleaded not guilty; and as to the residue of the information he pleaded, that he received the said receipts of one *Smith*, a solicitor, and received the money; and after discovery of fraud in *Smith* he gave notice to the persons, and paid the money to them, without prejudice to the Exchequer. To which it was demurred, for that this plea amounts to the general issue. But the court would not hear any argument concerning the plea before trial of the issue.

The King *and* Tyler. In B. R.

Case 71.

Writ, when aided by appearance of the defendant.

2 K. b. 461.

2 Inst. 667.

Caf. B. R.

416, 448.

Cro. Jac.

424.

1 Vent. 7.

1 Sid. 406.

2 Hawk. P.

C. 269.

Conviction

of man-

slaughter

with clergy

had good

bar to an

appeal.

1 S. l. c. 63.

S. m. 98.

Haw. P. C.

190, 4 Co.

4.

Kely. Rep.

94, 107, 2.

Leon. 111.

Caith. 16, 17, 18.

So it is if clergy were not had

by default of the Court.

Salk. 63.

2 Haw. P. C.

269, 93.

APPEAL for MURDER. The defendant (*protestando*, that the writ is not sufficient, for that there are not fifteen days between the *teste* and the return of it) pleads that he was formerly indicted for the murder, and found guilty only of manslaughter; whereupon he prayed the benefit of the clergy, and had it. To which there was a demurrer. And as to the writ, it was said by the counsel for the plaintiff, that this matter (of the *protestando*) was pleadable in abatement; but as the defendant hath not pleaded it, but only taken hold of it by *protestando*, the appearance aids the writ.

HOLT, C. J. said, that it appears upon the record; and altho' a voluntary appearance aids the defect of form in the writ, yet an appearance by coercion does not aid it; and by the law there ought to be fifteen days between the *teste* of the writ and the esloin-day; but here the appeal was tested the 9th day of October, returnable *quinden' Mich.* and the day of esloin happened on the 20th of October. *Sed adjourn'*

Freke

Freke and Thomas. In B. R. Rot 102.

[110]

Case 72.

DEBT by the plaintiff as administrator *durante minore etate* of *Dutton Stede*, upon a bond for 40l. made to Sir *Edwin Stede* the 1st of March 1693. which was not paid to Sir *Edwin* in his life-time, nor to the plaintiff afterwards, to whom administration of all and singular the goods and chattels of the said Sir *Edwin*, to the use and benefit, and during the minority of the said *Dutton Stede* a minor, which said *Dutton Stede* is now under the age of 21 years, to wit, of the age of 18 years, and no more, was committed, by *Thomas* by divine providence archbishop of *Canterbury*, &c. after the renunciation of all the executors of the will of the said *Edwin* by G. and E. the executors of the same will, in due form of law. To which declaration the defendant demurred; for that the administration granted to the plaintiff had ceased.

I, of Counsel with the defendant, insisted, that the declaration was ill; for it appears that *Dutton Stede*, during whose minority the administration was granted, had attained the age of seventeen years before the action commenced, and then the authority of the administrator ceases, according to *Pigot's case*, 5 Co. 29. a. Cro. Eliz. 602. But a diversity seems to be understood on the other side, between where an administration is granted during the minority of an executor, and where it is granted during the minority of one who is intitled to have administration; for the declaration takes notice, that the executors of Sir *Edwin Stede* refused, and that *Dutton Stede*, during whose minority the administration was granted, was the principal legatee, and so (as it seems) intitled to the administration: But I think this does not make any difference; for the reason why the authority of an administrator *during minore etate* ceases, when the infant attains the age of 17 years, is, that by the spiritual law, at that age he is capable of making a disposition of the goods of the deceased for the good of the deceased, and to take the administration upon himself. But this reason is of the same weight, as well when the minor is an administrator, as when he is executor, for the power of the one and the other is the same; and an administrator in the civil law is called *executor dutivus*; the person from whom the authority to administer is derived, who is the deceased, or the

Vide Hill.
7 Ann.
Administration *durante minore etate* of one intitled to the administration doth not determine until the infant hath attained the age of twenty-one years.
Ld. Raym. 667. S. C.
Salk. 39. S. C.

1 Brown. 46, 101.
2 Brownl. 247, 248.
5 Co. 9.
6 Co. 67, b.
Cro. Car. 516.
1 Roll. 5 26.
910.
Moor 462.
Cro. Jac. 590.
Yelv. 128, 130.
2 Sand. 213.
2 Jones 48.
6 Mod. 304.
1 Mod. 299.
Swinn. 45.
286, 287.
Hob. 251.
2 Roll. rep. 209.
Doctrin. Placit. 86.
[111]

De Term. Pasch. 13 Will. 3.

the ordinary, is not regarded, but that person only to whom such authority appertains, whether he be of age sufficient to administer; and therefore if an administration is granted during the minority of a woman, and she takes a husband of the age of seventeen years, the administration ceases; as it was held 5 Co. 29. b. *Prince's case*; by which it appears, that no more regard is had of a person appointed to take the administration by the deceased, than there is of a stranger. And this distinction was known to *Vaughan C. J.* for he thought, that an administrator *durante minore ætate*, if he brought an action, ought to aver, that the administrator or executor was under the age of 17 years, *Vaugh. 93. Edgcomb and Dee.* There an action upon the case was brought against an administrator *durante minore ætate* of *Charles Everard*, the son of the intestate: The defendant pleaded several judgments against himself, and no assets *ultra*. And upon a demurrer to the plea an exception was taken, that the judgments pleaded did not appear to be against him as administrator *durante minore ætate*. But the exception was not allowed; for that there is no need, in an action brought against an administrator *durante minore ætate*, for the plaintiff to shew that the administration is not determined; but in an action brought by an administrator *durante minore ætate*, he ought to aver, that the administrator or executor is under the age of 17 years; and an administration hath been granted to a person in his infancy. *Cro. Eliz. 542. Bade and Starkey.* If it is objected, that by the statute of 22 & 23 Car. 2. c. 10. Ordinaries in granting administration shall and may take of the person to whom administration is granted sufficient bond, &c. which bond an infant cannot give; it is to be observed, that the statute does not intend to make any alteration in the persons to whom administration is to be granted, but only to require a caution of the administrator, which if he cannot give, it ought to be taken of his surety in his stead; and it must be observed, that an administration *durante minore ætate* granted after the infant is seventeen years of age is void. 5 Co. 29. a. *Pigot's case*. But judgment was given for the plaintiff; for there was always a diversity between the cases where an administration is granted during the minority of one who is intitled to the administration, the which endures until the infant attains the age of twenty-one years; and so it was adjudged between *Atkinson and Cornish*, and between *Dubois and Dubois*.

Feltham

2 Anderf.
132.
Cro. Eliz.
718, 719.
3 Leon. 278.
1 Roll. 526.
520.
Moer 462.
C. o. J. ac.
550.
1 Roll. 1ep.
400, 401.
C. o. Car.
240.
1 Lev. 300.
Cro. Eliz.
404.
1 Roll. Abr.
288.
2 Saund.
212.
P. ph. 130.
C. o. J. ac.
441.
1 Mod. 47.
208.
3 Bullst. 180.
1 Vent. 102.
1 S. d. 449.
1 Lev. 299.
Yelv. 130.
Carth. 122.
1 Saik. 205.
4 Mod. 7.
Sira. 784.
5 Com. Dig.
198.
Vide Cro.
Car. 441.
[112]
Which im-
peaches the
authority of
Cro. El.
542.
Cro. Car.
516.
6 Mod. 304.
2 Lev. 37.
1 Roll. Abr.
510.
1 Sid. 57.
5 Mod. 395.
Comp. 475.
Swiab. 25.
P. ec. Chan.
175.
Poll. 159.

Feltham and Cudworth. In B. R. Pasch. ult. Case 73.
Rot. 97.

SCIRE FACIAS upon a judgment for 800l. against the defendant, who pleaded as to execution against his lands and tenements, goods and chattels, he could say nothing to avoid it, but as to execution against his body, he pleaded a composition with two thirds in number and value of his creditors, and therefore he was exempt from execution as to his body. To which it was demurred.

Composition made by virtue of the statute against bankrupts how to be pleaded. 3 Salk. 59, S. C. Far. 10. Mod. Caf. 58.

DEE, Common Serjeant made the following objections to the plea,

First, by the act of parliament the agreement ought to be by deed; for the statute says, by writing under their hands and seals, which in construction of law is by deed; and therefore the defendant ought to have pleaded it as a deed; and it is not sufficient for him to pursue the words of the act of parliament in this case; but it would have been sufficient if he had said, by a certain deed under their hands and seals, or by writing under their hands and seals, and afterwards delivered; and he ought in pleading to have shewn that the composition was by a deed.

Secondly, Then if the composition was by deed, there ought to have been a *profert hic in cur*.

Thirdly, It is not sufficient, that the composition was for the equal benefit of all the creditors, but it ought to appear to be for their equal benefit; but here are 2s. in the pound allowed to the creditors who subscribe, but it is not said, that it was for the benefit of the others who did not subscribe.

Fourthly, it does not appear when the 2s. in the pound shall be paid; for by the agreement it does not appear that he ever was in prison, and by the agreement the payment is to be made within five years after his discharge; and for that it doth not appear that the defendant ever was in prison, it does not appear that the composition shall ever be paid. *Sed non allocatur*; for as to the first objection, it is sufficient to pursue the words of the statute, and as to the second, there is no need to have a *profert hic in cur*. Mod. Ca. 58. And if the composition be made to the equal benefit of all the creditors, it is good, although it be not said in the agreement that the payment shall be to all; for those who sub-

scribe

[113]

De Term. Pasch. 13 Will. 3.

scribe cannot bind those who do not subscribe ; but the act of parliament requires the same payment to be made to all, as is agreed to be paid to the subscribers.

HOLT C. J. said that the composition upon the act of parliament is in the nature of a defeazance, and the first security was in force ; and therefore if there were a bond for 100l. and a composition for 2s. in the pound, an action might be brought upon the bond, and the bond would be defeazanced by the composition ; but as to the last objection, that there appears to be no day of payment, *dubatur* ; and therefore it was adjourned.

Case 74. *Gree and Rolls.* In B. R. Hill. 8 W. 3. Rot. 664.

In an ejectment against several, if one only confess lease, entry and ouster, and the others do not, how the verdict shall be.

2 Salk. 456, S. C.
2 Salk. 454.
Raym. 38, 73, S. C.
[114] Cal. B. R. 651.
12 Ed. 2. c. 4.
1 Ld. Ray. 706.
2 Roll. abr. 100.

EJECTMENT. On a special verdict the case was attempted to be moved, but was stopped by Mr. BRODRICK ; for here was a declaration against two defendants, Sir *John Rolls* and Mr. *Newell* ; at the assizes one of the defendants did not appear, and a *Nolle prosequi* was entered against him, and the other did appear, and a verdict was brought in, which could not be right in an ejectment, where the term is joint, for then, by the default of one of the defendants, the whole term would be recovered against the other : It may be otherwise in trespass where the trespass is several, and each party must answer for himself ; but that cannot be in ejectment according to the case 2 Leon. [114] 199. *Drake and Holland.* But in such case HOLT C. J. said, that if one defendant appeared and confessed lease, entry, and ouster, and the other did not appear, he would direct the jury to find as to the defendant who did not appear, Not guilty, if nothing was proved against him. *Sed adjournatur.*

Case 75. *Bailey and Cheesely.* In B. R.

Submission to an award good, tho' only conditional. 1 Salk. 72, S. C.

IT was moved to make a submission to an award a rule of the Court, upon an affidavit that it was so agreed at the time of the submission ; and the bond of arbitration being produced, it appeared to be with condition that the party shall stand to the award, and will consent to have it made a rule of court, otherwise the condition to be void. And it was insisted that there was no consent, but only a penalty

De Term. Pasch. 13 Will. 3.

in case he would not consent afterwards, and by the statute it ought to be a present consent; and if it was not so at the time of the submission, it never can be made so. But the court was of opinion that this condition was a consent, otherwise it was of no signification, and that if there was not a consent to make the award a rule of court, there is no submission, for the submission is contained also within the condition of the obligation.

Warner and Green. In B. R.

Case 76.

ACTION upon the case for stopping up a way, and the plaintiff declared that he was seised of eighteen messuages in St. *Buttolph's Aldgate*, and prescribed for a way from every one of those messuages over a certain vacant piece of ground, &c. to such a place; and after a verdict for the plaintiff, it was objected that it was not shewn what sort of a way he had, whether a foot-way, horse-way, or cart-way. *Sed non allocatur*; for it is said that he had a way *ire & redire*, &c. and after a verdict it shall be intended a general way for all purposes.

Declaration in an action on the case for a way, when helped by a verdict, where the particular sort of a way is not shewn.

Sterling and Tanner. In B. R.

[115]
Case 77.

ERROR of a judgment in C. B. and the plaintiff assigned for error, want of an original, and then the course is, that the defendant shall give a rule to the plaintiff to get a certificate whether there was an original, upon which the plaintiff shall take out a *certiorari* to enquire whether there was any original of that term of which the *placita*, &c. are entered, which in the present case was Trinity term. But here in this case the defendant did not give any rule, but at his own proper charge took out a *certiorari*, and procured a certificate of an original.

Error for want of an original, is not completely assigned until the certificate is returned.

But by the Court this is ill, for the error is not completely assigned until the certificate is returned, by which it appears, there was no original in the case.

Lamplugh and Shortridge. In B. R.

Case 78.

COVENANT. Defendant pleaded a release and confirmation, &c. to which it was demurred *quia duplex & caret forma*.

On a general demurrer duplicity not fatal.

But

De Term. Pasch. 13 Will. 3.

1 Salk. 219, 5. C. But by the Court, this is a general demurrer, for the demurrer ought to shew in what the duplicity consists, and upon a general demurrer, duplicity is not fatal.
Lut. 4. Mod. Caf. 118. H. b. 232, 1 Vent. 109. 1 Lill. 439 3 Salk. 141. 1 Saund. 78. 2 Saund. 97. Sid. 86.

Cafe 79. Palmer and Stavely. In B. R.

After a verdict the words *ad usum ipsius defendantis*, instead of *ad usum querentis*, shall be rejected.
1 Salk. 24, S. C.

INDEBITATUS ASSUMPSIT for money had and received by the defendant for the plaintiff, *ad usum ipsius* the defendant, where it was intended to have been "To the use of the plaintiff"; and after a verdict, it was moved in arrest of judgment, for that the plaintiff had declared of money had to the use of the defendant, and therefore had no cause of action of his own shewing, for the money being received to the use of the defendant the plaintiff cannot recover it. *Sed non allocatur*; for after a verdict for the plaintiff, the words *ad usum defendantis* shall be rejected, for a verdict could not have been found for the plaintiff, if evidence had not been given that the monies had been received for his use; and the declaration further says that the monies were received for the plaintiff, and so the subsequent words, *To the use of the defendant*, shall be rejected; and to this purpose were cited the cases between *Norworthy* and *Wildman*, 1 Mod. Rep. 42. 1 Sid. 306. and a case in this Court between *Pattison* and *Milton*,—W. 3. where a declaration that the plaintiff assumed to the plaintiff was aided after a verdict.

[116]

1 Keb. 615.
Mod. caf.
161, 309.
Caf. B. R.
510. S. C.

Cafe 80. May and King. In B. R.

ASSUMPSIT, the plaintiff declared that in consideration that he had delivered to the defendant a chariot, and had agreed to permit him to have the use of it for one year, the defendant promised to pay 200l. but it was not alleged that the defendant had the use of the chariot for a year; and this after a verdict for the plaintiff was moved in arrest of judgment. *Sed non allocatur*; for after a verdict it shall be intended that he had the use of it for a year, as it appears that the chariot was delivered to him.

Cafe 81. Lancashire and Kellingworth, executors of —. In B. R.

THE case appeared to be this upon the declaration: The testator covenanted with the plaintiff, upon the transferring so much stock in the *Hudson-bay* company, to pay
2000l.

De Term. Pasch. 13 Will. 3.

2000l. and the plaintiff avers that he was ready and offered to make a transfer, but that the defendant was not willing to accept of it. And,

HOLT, C. J. delivered the opinion of the whole court, and he said, if a man is to pay money upon an act done, and there is a tender of doing it, and the party refuses, it is tantamount as if it had been done; but here the tender is not well alledged, for the plaintiff says, that he was ready, and the defendant was not willing to accept, and whenever a man pleads a tender, he ought to plead a refusal also. Sid. 13, 31. 2 Saund. 350. Vent. 105.

Then if the defendant was not present, and for that reason he could not refuse; the plaintiff ought to shew that the defendant had notice, and that the plaintiff was ready, and no defendant came, &c. Yelv. 38. 1 Cro. 754.

And if it is pleaded that the defendant had notice and did not come, it ought to be shewn when and what time the plaintiff was ready, viz. that he attended to the last part of the day. 5 Co. 114. *Wade's case*.

And in such cases the later way of pleading is, that the defendant did not come, nor any other for him, though this is not of necessity; for if a man pleads a tender and refusal, it is sufficient to shew the refusal, without saying at what time the refusal was, for a refusal by the party at any time or place is sufficient; but if a man pleads notice given, by which it appears that the defendant was not present when the act ought to have been done, then the plaintiff must say that he was ready at such a time, viz. to the last part of the time when the thing was to be done, and that the defendant or any for him did not come; and the reason of all those cases is, that when the plaintiff himself is to do an act, and that act is not done, he ought to shew to the court that he had done every thing that was in his power. Hob. 107. 1 Cro. 694. 8 Co. 62.

And therefore judgment was given for the defendant by the whole court.

Parsons and Gill. In B. R.

IT was moved to refer the regularity of a judgment in debt; the declaration was of Hillary term, and judgment by confession which was signed after the term, and after the signing,

Cro. Jac. 13.
Yelv. 37, 38.
5 Bac. abt.
11, 12.
1 Wood.
Con. 316.
12 Mod.
530, 533.
2 Salk. 623.
S. C.
3 Salk. 34.
S. C.
When both parties meet, refusal must be shewn.
1 Saund. 320.
2 Saund. 350.
Lutw. 568.
S. C.
Cass. in B. R.
529.
Co. Lit.
208, b.
Cro. El. 73.
Cro. Jac.
13, 14, 377.
423.
12 Mod.
531.
Dyer 354.
Co. Lit.
202, a. 211.
a.
7 Co. 28, b.
Cr. El. 14.
Moor 122.
602.
10 Co. 129, a.
12 Mod.
421.
Ante. 90.
2 Bul. 144.
Cro. Jac. 9.
13 Co. 2.
Roll. rep.
373.
5 Bac. Ab. 9.
Ld. Raym.
611. 623.
Case 82.

Execution bearing teste before the judgment signed, when good.

De Term. Pasch. 13 Will. 3.

- [118] signing, viz. the 10th of April, the defendant died, and the execution bore teste the 23d of *January*; and it was insisted that it appeared that the execution was before the judgment. *Sed non allocatur*; for execution may be sued out after the death of the defendant, except against a purchaser, and the writ of execution may bear teste of the precedent term, even of the first day of that term.

Case 83. Sir Richard Levin *and* ——. In B. R.

Error for
want of an
original;
another ori-
ginal allow-
ed by the
court of
chancery.

ERROR of a judgment in C. B. in covenant. The plaintiff in error assigned for error want of original, and had a *certiorari* upon which it was certified, that there was no original; afterwards the defendant applied to the court of Chancery, and upon an affidavit that instructions were given to the cursitor for an original, but they were lost, the court of Chancery allowed that the original should be supplied; upon which the defendant in error prayed another *certiorari*, and an original was certified of the same term in which the default of an original was certified before, and now it was moved by Mr. BRODERICK that this was irregular, for before the second *certiorari* was returned, the defendant ought to have given a copy of the original to the attorney of the plaintiff; and the master informed the court that the course was so, when the second original certified was of another term; but it being in this case of the same term, the motion was not allowed.

1 Annæ. In B. R.

Machell and Clerk.

ERROR of a judgment in C. B. in ejectment; where upon a special verdict the case appeared to be this: *John Machell* seised of the land in question in tail, by indenture covenants to stand seised thereof to the use of himself for life, and after to the use of his eldest son and the heirs of his body, then to his second son, and so to all his issue successively in tail, and the 25th of January then next following he covenants to suffer a common recovery to other uses in fee, which recovery was had accordingly; in which A. was demandant against *John Machell* tenant, who vouched the common vouchee; and whether this recovery was good was the question; for if by the covenant to stand seised to the use of himself for life, &c. he was only tenant for life at the time of suffering the common recovery; then that recovery did not bar the estates of his issues, because it was suffered with a single voucher only, *John Machell*, not being vouchee, but only tenant to the *præcipe*, but if the covenant to stand seised did not alter the estate-tail, but that *John Machell* after such covenant, and at the time of the recovery, remained seised of the estate-tail, the recovery was sufficient to bar the issue in tail. And after judgment for Clerk (who claimed under the recovery) in the common pleas, it was several times argued in B. R.

And now, HOLT, C. J. delivered the judgment of the court, that the judgment in C. B. should be affirmed. And he said, that all the judges of the court, viz. LITTLETON, POWYS and GOULD, agreed with him, that the judgment should be affirmed.

As to the reasons of their judgment, he had not conferred with them, but that he thought it very reasonable, that the reasons and grounds of his own opinion should be declared in this case; and he was of opinion, that if a tenant in tail bargains and sells, or makes a lease and release to another

Case 84.

Tenant in tail covenants to stand seised to the use of himself for life, with remainder, and afterwards suffers a recovery to other uses; the uses on the recovery held good.

1 Salk. 619, S. C.

1 Salk. 338. 1 Show.

370.

4 Mod. 1, S. C.

Farell. 1 R.

Holt 615.

Rep. A. Q.

19.

3 D. 198, p.

10, 11

[120]

Covenant by tenant in tail, to stand seised to the use of himself for life, re- in

remainder to in fee, that the bargainee or releasee hath a base fee, and
 A. in tail is his estate is not determined by the death of the tenant in
 void; be- tail, but descends to the bargainee or releasee and his heirs,
 cause the till that estate is avoided by the entry of the issue in tail;
 remainder is to take and herein he relied upon *Seymour's case*, 10 Co. 96. If a
 effect after tenant in tail bargains and sells to one and his heirs, the
 his death. bargainee hath an estate to him and his heirs; and if
 1 Mod. 98, afterwards the tenant in tail levies a fine to the bargainee, it
 121, 159, corroborates the estate of the bargainee; so that altho' be-
 175. fore it was determinable by the issue after the death of te-
 3 Lev. 126, nant in tail, after the fine the issue in tail cannot avoid it;
 306, 307. and upon the case of fines, 3 Co. 84. and the common case
 2 Lev. 75, demonstrates it: If tenant in tail makes a lease for years
 213, 225. and dies, the lease is not void, but only voidable; for if
 2 Mod. 207, the issue in tail confirms it by the acceptance of rent, it is
 1 Vent. 372. good for the time, and cannot afterwards be avoided: Then
 What con- if his lease conveys an estate which is not determined by his
 veyances by death, there cannot be any reason to say, that his lease and
 tenant in release shall not convey an estate which will have a continu-
 tail, are de- ance until it is avoided by his issue; and this is not incon-
 feasible by sistent with the statute *de donis*; for although that statute
 the entry of says, that a tenant in tail shall not alien, yet by his seoff-
 the issue. ment he made a discontinuance, and put the issue to his ac-
 Dyer 279, tion of *formedon*; and the intent of the statute is answered,
 Pl. 7. when the alienation may be avoided by the action of the is-
 2 Cro. 565. sue. The bargain and sale, or lease and release of a tenant in
 Brdg. 97. tail, does not make a discontinuance; but it may amount to
 Leon. 111. an alienation of the inheritance which was in him, not-
 3 Leon. withstanding the statute; for as the statute *de donis*; is satis-
 212. fied when the alienation by the seoffment is avoided by the
 B idg. 96, *formedon* of the issue; by the same reason it is satisfied when
 97. the alienation by bargain and sale or by lease and release is
 Lit. sec. 618. avoided by the entry of the issue. The case was: tenant
 Co. Lit. in tail bargained and sold an advowson to one and his heirs,
 311, b. and afterwards died; the estate of the bargainee was not ab-
 Vice solutely determined, altho' it was of a thing which lay in
 Winch. 5. grant. 3 Co. 84. As to the case of *Litt.* —. and the case
 H. b. 339. of *Took and Glasscock*, 1 Saund. 261. where it was resolved
 1 And. 191. that nothing passed but for the life of the tenant in tail;
 3 Cro. 895, LITTLETON there is repugnant to himself; and HOBART
 said he confounded himself; and the case 1 Saund. after-
 wards resolved, That if a tenant in tail, after a bargain and
 sale to another and his heirs, levies a fine to a stranger,
 such fine avails to make the estate of the bargainee good to
 him

[121]

Lit. sec. 598.
 60, 606,
 607, 608,
 618.

De Term. S. Trin. 1 Annæ.

him and his heirs; but how can a fine to a stranger enure to the benefit of the heir of the bargainee, if the bargain did not give a base fee to the bargainee and his heirs.

But in the case in question, where tenant in tail covenants to stand seised to the use of himself for life, the remainder to his issues in tail; this is absolutely void, for the covenant to stand seised to the use of himself for life, cannot be of any avail, only as it was necessary to support the remainders dependant thereupon: But the remainder here limited after his death is absolutely void; as if a tenant in tail made a lease to commence after his death, the lease would be absolutely void, altho' a lease for years made by him *in presenti* hath continuance after his death, if it be not avoided by his issue.

And if there is a covenant to stand seised to the use of another and his heirs; this is good, and passes a base fee to the *cestui que use*.

And if a tenant in tail by bargain and sale, or by lease and release, conveys to another and his heirs, to the use of himself for life, remainder to another; the remainder is good, because of the transmutation of the possession.

So if he covenants to stand seised to the use of A. for life, remainder to B. and his heirs; it is a good remainder, altho' the tenant in tail dies during the life of A. until it is avoided by the issue.

But if he covenants to stand seised to the use of himself [122] for life, remainder to another; that remainder is void in the commencement, and nothing passes by the covenant; and therefore the recovery here was good. And the judgment was affirmed by the whole court.

Smith and Walgrave. In B. R.

Case 85.

REPLEVIN. The plaintiff declares for the taking of his cattle in a certain place called B. The defendant pleads in abatement, that he took them in a certain place called C. *absque hoc, quod cepit in præd' loco vocat' B. prout, &c. & pro returna habendo* he avows, &c. The plaintiff confessed the caption to be in C. and thereupon the avowant had judgment that the writ should abate, and for the return of the cattle.

Plaintiff in replevin shall not pay costs when the writ abates.

And now it was moved by EYRE, that the avowant shall have his costs. But it was resolved by the Court,

I

that

De Term. S. Trin. 1 Annæ.

that he should not have costs ; for the statute of 21 H. 8. c. 19. does not extend to this case, but gives costs only when the plaintiff is non-suited ; and the statute of 7 H. 8. c. 4. gives costs only when the plaintiff is barred ; but here the plaintiff is neither barred nor non-suited, but the writ only abates ; and he may have a new writ, and is not put to his second deliverance.

Term. Sanct. Hill.

1 Annæ. In B. R.

Redding and Royston.

THE Case was: A man seised of lands in fee, had issue two daughters, one of which had issue a son and died; the grandfather makes his will, and thereby devises the land to the son of that daughter and his heir; then the devisee dies, leaving his aunt and grandmother; the grandmother enters and enjoys a third part of the land as for her dower, and pays one moiety of the residue of the profits to the issue of the devisee, and the other moiety to the issue of the other daughter, and dies. The son of the devisee enters, and claims the whole by the devise, and therefore brought his ejectment against the son of the other daughter, who claimed the moiety by descent; and whether by this devise the lands should go to the heir of the devisee, or descend to him, as to one moiety, with his cousin, the issues of the two daughters as copartners, was the question. And it was insisted, that when an estate is devised to the heir, it descends and does not pass to him by the devise. But it was resolved by the Court, that the estate passed by the devise, and not by descent, for the reason why an heir, to whom land is devised by his ancestor, takes by descent and not by devise, is, because the devise was not necessary, forasmuch as the same estate is given by the will, that would have descended; but when the estate devised is altered in quantity or quality, the heir takes by devise; now by this devise there is an alteration of the estate, for if the land descended, both the daughters would be but one heir and would take as copartners; but when a devise is made of all to one or the son of the daughters, then the devisee takes by purchase in a different manner from what would be in case the land had descended. Then it was urged that the plaintiff was barred by the statute of limitations, for the profits of part of the estate were enjoyed by the son of the other daughter

Case 86.

Where an heir at law shall take by

devise, and not by descent.

Ante 72.

1 Salk. 242.

H. having two daughters, one

has a son, and dies,

and H. devises to the

son, he takes the whole

by devise. Co. Lit.

347, b.

1 Co. 93,

94, &c.

Moor 136,

pl. 281.

1 And. 69.

Dev. 65.

2 Salk 223;

Prec. in Ch.

222.

Jenk. Cent.

249.

1 P. Will.

475.

Cro. Eliz.

146, 204,

[124]

360, 376,

378, 454,

833.

3 Rep. 21;

2 Leon. 114.

Co. Lit. 9,

b. 11, a.

6 Co. 16, a.

Dyer 371,

74, 273.

above

De Term. S. Hill. 1 Annæ.

Cro. Jac. above twenty years. *Sed non allocatur*: for here was no ouster, and the statute of limitations does not extend to this case.

1 Roll. abr.

834. 2 Mod. 25. Bro. Test. 18. Bro. Est. 78. 2 Vern. 106, 319. Lut. 797. Ambl. 383. Plow. 28, 413. 10 Co. 41. 2 Brown. 68. Gilb. on Dev. 21, 22, 119. Cro. Car. 138. Carth. 93, 171. Statute of limitations where it does not extend. 2 Ld. Raym. 289. 2 Roll. rep. 219, 425. Goldf. 134. Ney 51. Owen 112. 1 Leon. 283. 1 Lutw. 809. Eq. Caf. Abr. 206. 3 Willf. 248. Ld. Ray. 829. Salk. 242. Sta. 129, 799, 1086, 1128. Andr. 125. B. R. H. 98. 10 Mod. 419. 3 Com. Dig. 24, 35. 1 Bac. Abr. 328, 403, 404. 2 Bac. Abr. 72. 3 Bac. Abr. 18, 23. 4 Burr. 1493, 1940. 1 Bl. Rep. 610. 2 Bl. Com. 156. Ld. Nott. argum. 35. 1 Brow. Ch. Rep. 191. Swinb. 113. 4 Bac. Abr. 321. Pow. on Dev. 263. Cowp. 836. 1 Brow. Ch. cas. 194.

Case 87.

Hunt and Burne. In B. R.

Vide ante
93.

THE case was now argued *seriatim* by the Court.

GOULD J. was of opinion that the judgment should be affirmed, and as to the objection, that by the verdict it is not found, that there was a writ of right, he was of opinion that it was not needful, for in all special verdicts, all necessary circumstances shall be intended. Lan. 15. 9 Co. 51.

Cro. Jac.

64, 1463

Yelv. 61.

Lit. rep.

200.

Cro. Eliz.

167, 181,

188, 669.

Co. Lit. 48.

5 Com. Dig.

170.

As to the principal case he was of opinion, that by the first fine there was a discontinuance for the three lives, for notwithstanding the statute 18 Edw. 1. *De modo levandi fines*, a fine may be well levied in antient demesne, for this statute does not extend to it. Hob. 47. 2 Inst. 106. Dyer 373. True it is that it cannot be a bar to the issue in tail upon an estate-tail made by the statute *de donis conditionalibus*, for a fine is no bar to such an estate, but by the statute of 4 H. 7, and 32 H. 8. But it is objected, that a fine is levied upon a writ of covenant which is a personal action, and cannot be brought in antient demesne; but I am of opinion, that a writ of covenant for a fine is a real action, and here the fine is levied according to the custom upon a writ of right close, Fitz. Nat. Brev. 11. but it is objected, that a court of ancient demesne is not a court of record, yet a common recovery there binds the estate.

But I am of opinion, that this discontinuance determines with the three lives: If tenant in tail makes a lease for the life of the lessee, this is a discontinuance of the estate tail; but if the lessee dies, the discontinuance determines; and I am of opinion, that the second fine does not make a discontinuance. 3 Co. 88, 89.

[125

I am

De Term. S. Hill. 1 Annæ.

I am also of opinion, that the right of entry is not lost by the twenty years; the statute of limitations does not bar the right, but only the remedy; if a lessee for life levies a fine, the lessor shall have five years after his death; for the right of the lessor is not barred by the non claim of the lessee, or by that of himself, during the life of the lessee.

POWYS, J. was of opinion that the verdict was good; for it is found, that by the custom a fine may be levied upon a writ of right close, and that a fine was levied there according to the custom.

He thought also, that a fine may be levied in the Court of ancient demesne, especially, it being found by the verdict, that it was levied according to the custom beyond time of memory. Hob. 48. 1 And. 71. Dy. 372. There it was also said, that a fine in ancient demesne bars an estate-tail; but 2 Inst. — takes notice of this case, and says, that a fine there does not bar the tail, but admits that a fine may be levied there.

He also was of opinion, that the fine in ancient demesne made a discontinuance, but it made a discontinuance only for three lives. And he held also, that the second fine did not make a discontinuance, for that it doth not take effect for the life of the conusor; and this is like the case, Co. Lit. — and the section — there, altho' it is not the text of LITTLETON, yet is good law, and founded upon good reason; and is allowed for law, 1 Jon. 109. Latch. 69. in the case of *Eustace and Scawan*.

He was of opinion also, that the ejectment is not barred by the statute of limitations, altho' the conusor died in the year 1956.

Then the issue might have a *formedon*, but now this remedy is barred by the statute of limitations; for there was a discontinuance for the three lives, and the entry of the issue was taken thereby, so that he could not have an ejectment until the determination of the three lives, when the discontinuance ceased, which was within twenty years. [126]

POWELL J. I am fully of opinion, that a fine in ancient demesne makes a discontinuance; for the statute of 18 Ed. 1. *De modo levandi fines* was only a declaration of the common law, and does not restrain fines in ancient demesne; for a fine in the common pleas levied of land in ancient demesnes make it a frank-fee, and is reversable by the lord in a writ of disceit; and it would be a hard construction of the
the

De Term. S. Hill. 1 Annæ.

the statute of 18 Ed. 1. *De modo levandi fines* (even if it was introductive of a new law, and much more so as it is only declaratory of the law) to make it restrictive to fines in ancient demesne, which cannot be levied any where else, Fines were leviable before the justices in Eyre, and before *Magna Charta*, c. 11. in B. R. *Rastal's Entries* 585, b. but the statute of 18 Ed. 1. intends only the restraint of fines in inferior courts upon bill or plaint there. The case 44 Ed. 3. 38. is not law; and no other case denies the power of levying fines in ancient demesne; and this case is founded upon the mistake, that a writ of covenant for a fine is a personal action, when it is a real action. And. 71, 4 Inst. 207, Kel. 96. b. Then this fine in ancient demesne is a discontinuance, but it is a discontinuance only for the lives; for although a fine *come, ceo, &c.* passes a fee generally, yet it is not so, when there is an express limitation for life. Bro. Fine, 12.

Then the second fine cannot make a discontinuance when the estate was discontinued before.

[127] Holt, C. J. I hold, that a fine in a court of ancient demesne is good, notwithstanding it is not a court of record; for this court can hold pleas in a writ of right, and give a final judgment there, and join the mise upon the mere right; for upon a writ of right close the plaintiff shall make protestation to prosecute it in the nature of a writ of right, Dyer 111. Then if it hath cognizance of a writ of right, which is an action of the highest nature, why shall it not levy a fine, which is not of so high a nature? It may be objected that *London*, and other ancient cities and burghs, may hold plea in a writ of right, but cannot levy a fine; but the custom and usage are to be considered in this matter; for they hold pleas by reason of a grant or of a prescription, which supposes a grant of all pleas real, personal and mixt; but by such a grant before the statute of 18 Ed. 1. *De modo levandi fines*, the power of levying fines did not pass; for it is a particular manner of action, which does not pass by a general grant. Then the city of *London* holds pleas in the same manner as the King's Bench or Common Pleas upon original writs; and if before the statute of 18 Ed. 1. the city of *London*, could levy a fine, yet at the same time it might be levied in C. B. but a fine of land in ancient demesne could not, even before that statute, be levied in C. B. then in the courts of *London*, &c. If a plea there could be carried elsewhere, and the parties admit the jurisdiction,

dition, it is good ; but if land lies in ancient demesne, altho' the parties admit the jurisdiction of C. B. yet the fine shall be reversed : Besides, if a tenant in ancient demesne cannot levy a fine in the court of ancient demesne, he will be under a greater disadvantage than other subjects are ; for he cannot levy a fine in C. B. and the power of levying fines is a great advantage, because thereby purchasers are effectually secured ; and it hath been a constant practice to levy fines there, tho' in some old books it is made a doubt of ; as in 44 F.d. 3. 37. for a fine must be levied on a writ of covenant, which is a personal action ; but that is a false foundation, for a writ of covenant for a fine is a real action. Fitz. Nat. Brev. 146. And a fine may be levied upon any writ whatsoever. 5 Co. 39, a. Kelw. 90. b. That fines may be there levied it is agreed. 2 Inst. 513, 514. Dyer 373. And there the dispute was only, whether such fine barred the estate tail.

And it is to be considered what will be the effect of a fine in ancient demesne, and I am of opinion that it shall have the same effect at common law as a fine of land that is frank-free would have at common law in C. B. and therefore a fine by a tenant in tail shall make a discontinuance in ancient demesne as well as in C. B. For a recovery against tenant in tail puts the issue to its *formedon* in ancient demesne as well as in C. B. 7 H. 4. 3. b. 7 H. 7. 10. And if a recovery there in a writ of right or other action hath the same force with a recovery in C. B. why shall not a fine there have the same operation with a fine in C. B. [128]

Then the force of a fine levied there for three lives is to be considered. A fine *sur conuſance de droit come ceo*, &c. supposes that the conuſor hath a precedent estate by the livery of the conuſee, and therefore a fine is improperly called a feoffment upon record, for there is a great diversity between a fine and a feoffment. If a man being disseised enters to make a feoffment and livery, this amounts to an entry, and passes the estate to the feoffee, but a fine by one out of possession passes nothing to the conuſee, but only extinguishes the right of the conuſor. 2 Co. 56. a. *Bucker's* case.

But it may be objected, that the fine was levied before the steward and attornies, when the suitors are judges of the Court ; but the tenants who are suitors may make attornies by the statute of *Merton*, 20 H. 3. and those attornies may sit as judges there.

Then

10 E. 4.

22 a. b.

19 E. 4. 2.

21 E. 4. b.

Co. Lit.

214, 266.

277.

3 Co. 59.

Cro. Car.

306, 484.

Co. Lit. 49.

a.

1 Jones

316, 398.

Goldsb.

162.

1 Ro. 865,

E. pl. 3.

3 Co. 90,

a. 91, a.

De Term. S. Hill. 1 Annæ.

Then it hath been objected, that a fine *sur consueance de droit come ceo*, &c. imports a conveyance in fee, and this being for three lives is a contradiction, yet a fine *come ceo*, &c. may be qualified to a less estate, as appears by 41 Ed. 3. 14. a.

[129] I also hold that this discontinuance determines with the three lives, for the lives make the discontinuance, then the estate being discontinued by the first fine, cannot be more discontinued by the second, and this is without question according to LITTLETON.

I also hold, that the discontinuance by the first fine continuing, the second fine cannot make a discontinuance, although it is a warranty; for if tenant in tail, reversion in fee, makes a lease for life, and afterwards the reversion is granted with warranty, yet this does not make a discontinuance.

Then as to the statute of limitations, it is to be considered whether the issue in tail was ever bound by the statute of limitations.

And I am of opinion, that the *formedon* was not barred, but if it was barred, yet when the three lives determined, a new right accrued to the issue, and he might enter and have his ejectment, for it is not of any consequence, that upon supposition he was barred of his *formedon*, to which he had a right, that therefore he must be barred of his right of entry, which at that time he had not.

Judgment affirmed by the whole Court.

And in this case it was declared by HOLT, C. J. as his opinion *obiter*, That if a copyhold was intailed by custom, a common recovery in the Lord's Court, would bar the issue in tail, and those in the remainder, for if the intail of a copyhold is allowed, a common recovery to dock it ought also to be allowed.

That the privileges of lands in antient demesne must in their original have been conferred by act of parliament, for they could not commence by grant or prescription.

[130] If a tenant in tail grants *totum statum suum*, the estate-tail is not in abeyance, as LITTLETON and COKE speak, for if the grant be to the grantee and his heirs, it passes a base fee; so if a tenant in tail releases all his right to a man and his heirs, a fee determinable upon his life passes; so also if a tenant in tail bargains and sells to a man and his heirs, and if the tenant in tail afterwards levies a fine to the bargainee,

De Term. S. Hill. 1 Annæ.

on

gaine, this does not make a continuance, for the base fee was before vested in the bargaine. 10 Co. 95, b. Seymour's case. Co. Lit.

If tenant in tail makes a lease of three lives pursuant to the statute, with warranty to the lessee and his heirs, this does not make a discontinuance, but the lease is good notwithstanding the warranty, and whenever the warranty makes a discontinuance, the discontinuance ceases by the release or extinguishment of the warranty.*

262, a. 372,
a. b. 326, u.
2 Inst. 519.
3 Inst. 216.
1 Leon. 77,
213.
2 Leon. 53,
157.
3 Leon. 40,
221, 227

1 And. 170. Poph. 108, 114. Cro. El. 561.

* There must be an actual entry to avoid a fine. Strange 1086. Dougl. 483.

D E

Termino Pasch.

2 Annæ. In B. R.

[131]

Case 88.

The Queen and Burnaby.

CONVICTION before justices of peace on the statute of 43 Eliz. c. 7. against such persons as shall cut wood, underwood, break hedges, &c. for cutting down several trees called lime-trees; and an exception was taken, that the conviction files the defendant gentleman; which shews that the defendant was a gentleman, and the statute was intended against mean and disorderly persons only; and so he who hath ability to answer damages ought not to be convicted upon this statute, where he is ousted of a trial by a jury, and hath not opportunity to make out his title if he claimed property; and the stile and the preamble of the act, and also the statute of 15 Car. 2. shew that those acts were intended against lewd and pilfering persons, and then a gentleman shall not be intended to be comprised within the meaning of them. *Sed non allocatur*; for the Court cannot distinguish between the ability of persons, and there is no certain rule or limit to determine by who are able to answer damages and who not; and if a gentleman does a base or inferior act, his quality is not any excuse, but an aggravation of his offence: And the Court thought, that if the defendant claimed property before the Justices, they ought not to have made the conviction; and if they proceeded to do it a prohibition lies, either before or after the conviction; and by the opinion of some, if property were alledged before the justices, who afterwards made the conviction, and awarded damages, an action would lie against him who took the damages. But here the conviction being removed by *certiorari*, a prohibition cannot be. But by *HOLT C. J.* The defendant may make a suggestion upon the roll of his property, by way of plea, and thereupon it shall be tried; and *St. John's case*, 5 Co. 71. does not make to the contrary. But the other judges seemed to be of a contrary opinion in this point.

Another

[132]

3 Cro. 821.
Tremain
354.
2 L. Raym.
500.
2 Bl. Rep.
1210.
Hard. 484.
3 Inst. 160.

De Term. Pasch. 2 Annæ.

Another exception was, That the offence is alledged at *Bampton* in the county of *Huntingdon*, and afterwards it is said, that the defendant *apud Bampton præd'*, &c. and *Bampton præd'* does not import *Bampton in com' præd'*, for *Bampton* may extend to two counties, and part of it may be in *Huntingdonshire*, and part in another county. *Sed non allocatur*; for although it may be in two counties, yet *Bampton præd'* is no other than that *Bampton* which was before mentioned in the county of *Huntingdon*.

Note. In this case the three Justices against Holt denied St. John's case to be law: and said the record was not to be found.

The third exception was, that the conviction was for cutting down several trees, and damages to 20*l.* given, but does not shew the number of the trees, which ought to be the measure of the damages; and if an action should be brought for the trespasss, this conviction cannot be pleaded in bar, for it will not appear that the conviction was for the same trees; and therefore the number and quantity of the trees ought to be mentioned expressly in the conviction, as well as in an action for the trespasss; as in 5 Co. 54. *Plater's* case.

Ld. Raym. 1406.
1 Vent. 122.
123.
3 Will. 292.
Wm. Jones 440.
Cro. Car. 553.
1 Lev. 203.
3 Cro. 821.

And for this cause the Court was of opinion that the conviction was ill.

Sir Charles Hale and Owen. In B. R.

Case 89.

ACTION for a false return of a citizen to serve for the city of *Coventry*, and several exceptions were taken after a verdict to the declaration.

A Sheriff shall not take advantage of his own irregularity to excuse himself in an action.

First, That the declaration mentions, that the writ issued out of Chancery (*recitando*), &c. and after the recital, then it says *præcepit*, &c. and so there does not appear any nominative case to the word *præcepit*. *Sed non allocatur*; for the King is before mentioned, and shall be the nominative case to the verb *præcepit*; so in a *præcipe quod reddat*, *præcipe A. quod reddat B. 10*l.* quas ei debet & injuste detinet ut dicit*; there is no nominative case, yet it is good *Latin*; and A. shall be the nominative case to the words *reddat & debet*; and B. is the nominative case to the word *dicit*; so in pleading, *Et hoc paratus est verificare unde petit judicium & dampna sua*, &c. no nominative case appears to the words *paratus est & petit*.

[133]

Other exceptions were taken to the declaration, for that the plaintiff had set forth the proceedings of the Sheriff in his election, by which it appears that the Sheriff did not proceed

De Term. Pasch. 2 Annæ.

proceed regularly to an election, and therefore there was no election, and then no action can be for a false return. *Sed non allocatur*; for the sheriff shall not take advantage of his own irregular proceeding to excuse himself from an action.

But by HOLT C. J. it was sufficient for the plaintiff in this case to have said, that such a writ issued, and was delivered to the Sheriff, upon which he proceeded to an election *secundum exigentiam brevis*, and that the plaintiff was *debite modo* elected.

But yet judgment was given for the plaintiff by the whole Court.

Case 90.

Coggs and Barnard. In B. R.

Where an action on the case lieth on bailment or undertaking. 1 Salk. 26. S. C. 2 L. Raym. 909. S. C.

[134]

But defendant not punishable if the damage was by accident. Kelw. 50. 78.

1 Roll. Abr. 91. pl. 16. 2 Hen. 4. 24. 29 Hen. 6. 49. 20 Hen. 6. 34. Br. Action sur la case 40, 72. 3 H. 6. 36. S. Br. Action sur la case, 7. S. C. 3 Salk. 11. 268. Holt 13, 131, 528.

L. Raym. 912.

Vide, Objections to

ACTION upon the case; in which the plaintiff declares that the defendant *super se assumpsit* to carry safely a hogthead of wine, and that by the default of the defendant the wine was lost; and after a verdict for the plaintiff, it was moved in arrest of judgment, that the declaration did not shew that the defendant was a common carrier, or that for any sum of money *super se assumpsit*, and so no appearance of any *premium* given to the defendant, and therefore no action lies *.

And it was resolved by all the Judges of the Court, that the action lay, for here is a special undertaking. And although the defendant might have refused to carry the wine, yet as he made a voluntary undertaking to carry it safely, if he does not do it he shall be punished for the damage which the plaintiff suffers by his neglect.

1 Roll. Abr. 91. pl. 16. 2 Hen. 4. 24. 29 Hen. 6. 49. 20 Hen. 6. 34. Br. Action sur la case 40, 72. 3 H. 6. 36. S. Br. Action sur la case, 7. S. C. 3 Salk. 11. 268. Holt 13, 131, 528.

There are six sorts of bailments which are sufficient for the maintenance of an action.

Vide, Objections to these divisions in Jones on Bailment.

Depositum. First, A naked bailment, when a man delivers goods to another to keep.

* The rules of law are in general the same, by what ever means the goods are legally in the hands of the possessor, whether by delivery from the owner which is proper bailment, or from any other person, by finding, or in consequence of some contract. Doct. and Stud. dial. 2. ca. 38. Ld. Raym. 909, 909. 917. Vide Owen 141. 1 Leon. 224. 1 Cro. 219.

Second,

De Term. Pasch. 2 Annæ.

Second, When a man sends cattle to another which are profitable, *gratis*. Accommodatum.

Third, When a man delivers goods or cattle to another for hire. Locatio, or Condectio.

Fourth, When goods are delivered to another as a pledge. Vadium.

Fifth, When goods are delivered to another to be carried for hire.

Sixth, When goods are delivered to another to be conveyed, or for a particular purpose without hire. Madatum, Brat. lib. 3. 100. In English commission.

If a man hath goods upon a naked bailment, he is not chargeable if they are lost, &c.

Neither is he chargeable for a common neglect, and therefore *Southcott's* case is not good law, which says that a man shall be charged in an action on a general bailment, and it hath been the general practice for twenty years last past. If a man hath goods to keep, and they are stolen, although there be a neglect in him, as if he omits to shut the door, &c. he shall not be charged with them if he keeps them with the same care as he does his own. 1 Inst. 89, a. b. 4 Co. 84. This case is also denied to be law in [135] 2 L. Raym. 909. Vide a reading on this case in Jones on Bailm. 31. Fitzh. Det. 59. Raym. Ed. 2. 275, Bouviers cas. See a reading on this case in Jones on Bail. 28. Veian Comment on Justinian Inst. 684. Bract. 99. Doct. & Stu. 123. 112. Hob 34. 2 Cro. 425. Ld. Raym. 912. 3 Cro. 514. Godb. 64.

So if a man makes bailment to another, and he makes an express promise to keep the things safely, yet he is not chargeable without his wilful default, for such promise shall not charge him further than he was chargeable before; it would not do so if it was in writing, and for the same reason it shall not do it, if it is by parol.

The second species of bailment obliges to a strict care, for if a man permit another to have his horse into the *West*, and he rides to the *North*, and the horse dies, the bailee shall be charged for him.

But if such horse is stolen out of the stable without any fault in the bailee, he shall not be charged.

Otherwise if he permit the door to be open and the horse is stolen, for then he shall be charged *.

The third species of bailment is when goods are left with the bailee to be issued by him for hire, and in this case the bailee is obliged to take the utmost care, and to return the goods when the time of hiring is expired.

* If the depositary be slightly or even ordinarily negligent in keeping the goods deposited, the favourable presumption is, that he is equally neglectful of his own property; but this presumption like all others may be repelled, and if it be proved, for instance that his house being on fire, he saved his own goods, and having time and power to save also those deposited, suffered them to be burned, he shall restore the worth of them to the owner. Poth. Contrat. de Depot, n. 29 Stiemh. de Jure Suon. l. 2. c. 5. Jones on Bailm. 35.

The

2 Hen. 7.
33 Hen. 6.
34.
11 Hen. 4.
33.
Owen 141.
Keb. 16.
Bract. 62.
Bract. 99.
29 Aff. pl.
28.

The fourth species of bailment is as a pledge, and if the using of the thing will hurt it, the bailee must not use it.

But if the using will not hurt the things pledged, the bailee may use them, as jewels, &c. but if the bailee use them and they are lost, he shall answer for them, but if he does not use them, but keeps them in his chest, and they are stolen, he shall not answer for them.

If the keeping of the pledge is chargeable, then the bailee may use it, as if a cow is pledged, the bailee shall have the milk.

[136]

But when the money is tendered for the goods pledged, and the bailee refuses to deliver them, then his special property is determined, and he by the detainer is a wrong-doer; and if the goods are afterwards stolen, he shall answer for them.

The fifth species of bailment is, for carrying for hire; as where a man delivers goods to them who have a common or publick trust, as a common carrier or hoyman, &c, if these are robbed by enemies of the king, they shall not be answerable; otherwise if they are robbed by the violence of robbers.

So if the delivery be to a common factor, although he hath hire, he shall not answer for an act done without his default; as if the goods are stolen he shall not be chargeable.

1 New Abr.
243.

4 Rep. 83.
b.

1 Ro. Ab.
338.

Co. Litt. 89.
a.

Doct. & St.
129.

1 Lill. Abr.
193, 194.

2 Show. pl.
166.

Co. Litt. 89.
Moor. 543.

See 2 Black.
Com. 452.

So in our case, according to the sixth sort of bailment, he (the defendant) should not be chargeable by an act which did not happen by his own default; as if any other had pierced the hogthead of wine, he should not be answerable for it.

When a man acts by commission, it obliges the person to that care, and he shall be answerable for goods which are lost by his neglect.

For the neglect is a deceit upon the person who trusts him; the party who intrusts expects diligence and fidelity of him who is trusted, and for breach of trust an action lies; as Godb. 64.

If the defendant had only offered himself to carry, there he would not have been chargeable, it would only have been a *nudum pactum*; but here, as he *super se assumpsit*, the word *assumpsit* imports an undertaking; and when a man undertakes to do a thing, and misdoes it, an action lies against him for that, though nobody could have compelled him to do the thing; and to prove this was cited 19 Hen. 6. 49. 11 Hen. 4. 33. Yel. 4. 128. 2 Cro. 667. And judgment was given for the plaintiff.

DE

Term. Sanct. Mich.

2 Annæ. In B. R.

Ewer and Jones.

[137]

Case 91.

A PROHIBITION was moved for to the Admiralty Court in a suit there for mariners wages, and the defendant pleaded that it appeared by the libel, that the contract upon which the libel was founded was above six years before, and therefore by the statute of limitations the plaintiff was barred; this plea was there refused. And now on the motion for a prohibition it was urged, that a suit in the Admiralty for seamen's wages is allowed there only for the convenience of their joining in the suit; but if the Admiralty Court will not admit a plea of the statute of limitations, which is a bar at common law, the defendant there will be greatly prejudiced; and this Court will grant a prohibition.

Mod. Ca. 25.
Where a prohibition to the Admiralty Court on a libel there for seamen's wages, shall not go.
2 L. Raym. 934.
3 Salk. 227.
S. C.
6 Mod. 25.
S. C.

The COURT was of opinion, that although in a cause originally suable in the Admiralty, that Court shall proceed according to their own law, yet when the Admiralty Court refuses to allow a plea in bar or proof pleadable and allowable at common law, this Court hath a jurisdiction to prohibit them from proceeding; but in this case the statute of limitations is not well pleaded, for it ought to say that the cause of action did not arise within six years, and it does not appear to this Court, for what cause the plea was disallowed there. And therefore a prohibition was not granted.

[138]

Ward and Sir Stephen Evans. In B. R.

Case 92.

ACTION upon the case, in which the plaintiff declared upon an *indebitus assumpsit* for money had and received to the use of the plaintiff; and upon the evidence at the trial, a case was referred to the judgment of the Court, Where a bill drawn upon a person who becomes a bankrupt

De Term. S. Mich. 2 Annæ.

the next
day, shall
not be
deemed
good pay-
ment.
Mod. Caf.
36.
2 Salk. 442.
S. C.
2 L. Raym.
928 S. C.

and appeared to be this: *Fellows* was indebted to the plaintiff upon bill of 60l. who sent his servant to *Fellows* for the money, who gave him a note of Sir *Stephen Evans's* for 100l. the servant carried the note to Sir *Stephen Evans's*, whose servant indorsed 60l. off the 100l. note, and for the 60l. gave the plaintiff's servant a bill of 60l. 10s. on one *Wallis*, a goldsmith, and the servant of the plaintiff paid to Sir *Stevens's* servant the 10s. difference, and the next morning went to *Wallis's* who had failed, and was a bankrupt, although for all the precedent day he had answered and paid bills; and when the plaintiff's servant found that *Wallis* was a bankrupt, he delivered back the bill upon *Wallis* to Sir *Stephen Evans*, who refused to take it, and insisted that the acceptance of the bill upon *Wallis* was payment of the 60l.

Act of a ser-
vant binds
not his mas-
ter, unless
he acts by
authority of
his master,
or he con-
sents.
2 Lev. 172.
3 Lev. 252.
Comb. 451.
1 Salk. 132.
333.
Winch. 24,
25.
5 Mod. 398.
399.
3 Salk. 118.
Caf. B. R.
521.
Holt 120.
1 Bul. 103.

And it was now resolved by the COURT in favour of the plaintiff; that the indorsement of the 60l. off the bill of 100l. was evidence of the receipt of so much money by Sir *Stephen Evans* for the use of the plaintiff; for the cash of *Fellows* lay at Sir *Stephen Evans's*, and his indorsement of 60l. off from the 100l. bill (upon which the bill of the plaintiff for 60l. upon *Fellows* was delivered up and cancelled) made a new receipt of so much money to the use of the plaintiff; then the delivery of the note upon *Wallis* for 60l. 10s. to the servant of the plaintiff, is not payment to the plaintiff, for he ordered his servant to receive the money, and not a bill, and then the receipt of a bill without the express authority of his master shall not bind the master.

Termino Paschæ.

4 Annæ. In C. B.

Anne and Richard Fitzgerald, Executors of Richard
Fitzgerald, and Cragg.

Case 93.

IN Debt upon bond made to the testator; after Oyer of the obligation and condition, by which it appeared, that the defendant and two others were named to be jointly and severally bound to the testator, the defendant pleaded in bar a covenant made by the testator to him, that he should not be sued upon this bond that was made by the defendant and two others. The plaintiffs reply, *Non est factum testatoris*; whereupon issue was joined, and a verdict for the defendant.

Action upon a joint obligation will be bad, if it does not appear that all executed it.

And now, Serjeant PRATT moved, that the defendant might plead over again; for that he could not plead this covenant of the testator's in bar, but could only take advantage of that by action of covenant; and the difference was, where a man makes a bond to a single person, and he makes a covenant that he will not sue the obligor; this may be pleaded in bar, for it amounts to a release and discharge of the action; but where there are more obligors, and the obligee covenants that he will not sue one of them, this will not amount to a release, for then all the obligors would be discharged; but the defendant might have covenant if he be sued; and so it was resolved in the case of *Tracy and Kenaston* in B. R. Trin. 13 W. 3. which was entered Mich. 11 W. 3. Rot. 193. and so it seemed to be allowed by the Court.

But, TREVOR C. J. objected, that it did not appear by the record, that the two others executed the bond; for though by Oyer of the bond it appears, that they are named in the obligation, yet if they did not seal and execute it, it will not avail; and this should appear by averment, or otherwise upon the record; for if it does not appear, it shall not be intended: So it was adjourned.

[140]

K

After

De Term. Pasch. 4 Annæ.

Afterwards in Hill. the 4th of the Queen, it was urged that the deed, in which the covenant was, recites, that the defendant and the two others were jointly and severally bound to the testator, and thereupon he covenants not to sue the defendant upon the said bond, and that defendant was bound by the recital, as a lessee would be estopped by recital in a lease ; but the Court did not much regard this.

Then it was urged, that the covenant was not to sue upon the said bond, viz. upon the obligation, in which the defendant and two others were jointly and severally bound ; that the defendant, in pleading this matter to the action of the plaintiff upon this bond, all owed it to be a bond in which the defendant and two others were bound, otherwise the covenant would not extend to it ; and for this cause it was ordered he should plead again.

Term. Sanct. Hill.

4 Annæ. In C. B.

Barker & ux' and Palmer.

IN A SCIRE FACIAS upon a judgment in the Common Pleas by the wife whilst she was sole, defendant pleaded a release; and an exception was taken that no place was alledged where the release was made, and it would be material upon a general demurrer. Resolved Cro. Eliz. 78, 98. Adm. Cro. Car. 225. that the omission of a place is substance and the case of *Kerby and Whitelow*, Lutw. 1501, is stronger. In trespass, for taking three measures of barley at *Wallingford*, defendant pleaded that *Wallingford* was an ancient borough and corporation, and had a market and toll of one pint of grain for every comb of grain sold there by any foreigner; that *John Ferren* a foreigner brought five quarters of barley there to sell, and sold them to the plaintiff; and because it was not said that he sold them there, and no place was alledged where the sale was, judgment was given for the plaintiff for the default in the plea. So if defendant plead a submission to an award, and does not alledge the place where submission was made, it is bad. Resolved upon demurrer; Cro. Eliz. 66. and without difficulty judgment was given for the plaintiff.

Case 94.

Plea without shewing the place of anything material is bad.

In trover the place of conversion must be alledged.

Cro. Car.

262.

Bull. N. P.

46.

5 Com.

Dig. 30.

Cro. El. 74.

10 Co. 56, b.

Goulds. 89.

Yelv. 166.

Cro. Car.

262.

1 Brownl. 8.

5 Com. Dig.

30, 118.

2 Term rep.

75.

Sed vide

stat. 16 &

17. Car. 2,

ca. 8.

Lut. 1142.

1501.

Salk. 4.

Barker and Lamplugh: In C. B.

[142]

Case 95.

Discharge of a promise when a good plea.

IN ASSUMPSIT upon several promises, defendant pleads, that after the taking upon himself the payment of the money, one *Theopla Judd* took upon himself to pay it to the plaintiff for the defendant; which promise the said plaintiff accepted, and intirely discharged and released the defendant.

Plaintiff demurred, for that the plea in the whole or many parts of it was bad.

K 2

First,

De Term. S. Hill. 4 Annæ.

See Ante,
141.

First, No place was alledged where the promise was made, as above.

Co. Lit. 212,
b.

Perk. scd.
749.

But a gift
of house,
&c. i good.

9 Co. 79, a.
Yelv. 11.

Dalt. 49,
pl. 13.

Moor 49.
Lut. 466.

Secondly, The promise of a stranger cannot be pleaded in bar of the promise of the defendant; if it should be intended as one agreement, it is not good without satisfaction. 9 Co. 79. *Peitoe's* case, &c. and one promise cannot be a satisfaction for another; a small sum is not satisfaction for a great one on the same day. Co. Litt. 213. 5 Co. 117. *Pinnell's* case.

Also here the promise is not said to be by writing; and by statute 29 Car. 2. Ca. 3. no action shall be brought to charge any person for the debt, &c. of another, unless some note of it be in writing; and without difficulty judgment was given for the plaintiff. 1 Willf. 118. 305. *Ld. Ray.* 1087. 2 Willf. 94. *Cowp.* 227. 2 Term Rep. 80.

Case 96. *Poulton, Attorn', &c. and Anne Goddard, Executrix of Thomas Goddard. In C. B.*

Plea, that
the defend-
ant fully ad-
ministered
ante exhibi-
tionem billæ
ipfius the
plaintiff,
where it

[143]
ought to
have been
ante impe-
stationem
brev' de at-
tachment
held bad.

IN AN ACTION UPON THE CASE for money due to him as attorney, for the business of the testator, defendant pleads *plene administravit ante exhibitionem billæ ipfius* the plaintiff. Plaintiff replies, that defendant had done waste; and upon demurrer it was allowed, that the replication was bad; but then the plaintiff took exception to the plea, because that the plaintiff sued by writ of attachment of privilege, and the defendant says, before the exhibition of the bill of the plaintiff she had fully administered, where it ought to be before the issuing out of the writ of attachment of the plaintiff; and therefore in the case *Lut.* 933. *Royston*, executor of *Royston*, ver. *Barton*, in debt upon bond to the testator, defendant pleads a composition by two thirds of the creditors in number and value, according to the statute 8 W. 3. and alledged that the composition was made before the exhibiting the bill of the plaintiff, where the suit was in C. B. by original writ; and therefore the plea ought to have been, before the suing out of the original writ; and for this cause judgment was given for the plaintiff; and it makes no difference that here the suit be by an attorney who does not sue by original writ; for the suit by writ of attachment is in the nature of an original: For as against other persons the original is by summons in debt and by attachment, only in trespass

De Term. S. Hill. 4 Annæ.

trespafs and other actions which are *vi & armis*, so the attornies and other ministers of C. B. have privilege to sue at all times by attachment. It is true, that it is usually said, that attornies, &c. should sue by bill; and when an attorney of C. B. pleads his privilege, he says it is the custom, that no attorney is compellable to answer any one upon original writ, but by bill only. Lut. 195. b. and 4 Inst. 99. It is said, that C. B. can hold plea by bill against officers of the court, and other persons privileged; and I allow, if the suit had been against an attorney, the plea had been well; for he may sue by original bill, as is cited in Lut. 228. and so if in B. R. the suit commenced by bill of *Middlesex*; for a *latitat* always supposes a bill of *Middlesex*, that is in the place of an original there; for all persons there sued by bill are supposed to have privileges of the Court, being in the custody of the marshal, or present in the Court, as attornies or officers there: So in a suit against an attorney of the Common Pleas, who is supposed to be present in Court, the suit commences by bill, and the entry is as in B. R. That the plaintiff brought — or, That the plaintiff exhibited his bill against the defendant. 1 Bro. Ent. 33. But in a suit by an attorney, he may sue by writ of attachment of privilege, that is the first process for him; and when the defendant is brought into Court by this writ, he declares against him in like manner as other persons declare upon an original writ; as appears by the precedent Lut. 343. 2 Bro. Ent. 8. Rast. 552. in trespass; and if a man declares in the Common Pleas *per queritur*, and not upon an original writ, original bill, or writ of attachment of privilege, it is error; as was ruled Lut. 227, 228. *Dimock versus Witherall* an attorney of this Court; and judgment was there against the plaintiff for this cause only.

[144]

DE

Termino Paschæ.

[145]

5 Ann. In C. B.

Case 9th.

Stonehouse and Ilford.

Executor
may plead
payment
of rent to
debt upon
bond, &c.
contra.

IN DEBT for rent incurred in the life time of the testator against the defendant, executor of A. upon lease made by parol to A. for one year, and so from year to year, as long as both parties shall please; The defendant pleads, that the testator was in debt to him upon two several bonds, the one for 200l. the other for 40l. and that he had not assets, only 20l. which he retained towards satisfaction of his 240l. aforesaid; and upon this there was a demurrer.

And now it was argued by Serjeant CHESHIRE, that the plea did not avail.

First, Because that debt for rent that favours of the realty is of an higher nature than debt upon bond; and therefore retainer for debt upon bond cannot be pleaded to debt for rent; it was agreeable to the case between *Godfrey and Newport*, 2 Vent. 184. where it was resolved in the Common Pleas, and afterwards affirmed in error in B. R. that a man cannot plead debt upon bond to deny satisfying an action of debt for rent.

Secondly, Defendant cannot plead a retainer for part of his debt, for he ought to plead a retainer for his whole debt, otherwise it does not avail; for he ought to have debt for the whole against the executor, or for the whole against the heir; but how can he have debt against the heir, if he retains for part as executor: Also he ought to have pleaded, that he agreed to retain before the action commenced: for when testator is in debt to his executor, and he agrees to retain for his own debt, this is administering for so much, but it is not administration till his assent to make retainer; for then he might give it in evidence upon *plene administravit* and if the defendant pleaded, that the testator was indebted to him, without more, this would be bad; but for that reason such plea should be insufficient, if the law would

[146]

De Term. Pasch. 5 Annæ.

would imply an administration for so much as the testator was indebted to him, without his assent to make a retainer for so much for his satisfaction; and therefore it was resolved by all the justices, between *Burditt* and *Pix*, 2 Brownl. 51. where the defendant pleaded a retainer for his own debt, that the plea would not avail; because that he did not shew, that he had made election before the action commenced to retain the goods for satisfaction of his own debt; which seemeth, as he said, an express resolution in point. But by the whole Court it was resolved, that the plea was good, for debt for rent and upon specialty are in equal degree; and so it was resolved between *Adon* and *Gage*, Pasch. 9 Will. 3. and there it was also resolved, as Serjeant GIRDLER who argued for the defendant, said, Girdle 39. that the retainer may be for part of the debt towards satisfaction; and so it was here agreed by the Court without difficulty.

And by the Court it was not a necessary allegation, that he elected to make a retainer before the action commenced; for when testator is indebted to his executor, retainer is administration for so much, and be given in evidence upon *plene administravit*.

Dummer *ver.* Birch. In C. B.

Case 98.

IN COVENANT. Plaintiff declares, that *inter alia* the defendant covenants, that he would discharge all duties and charges due before the first of October next; and the plaintiff assigned for breach, that the defendant did not pay or discharge all duties and charges for which these premises were chargeable. To which there was a demurrer; and argued, that the breach was neither within the words, nor pursuant to the intent of the covenant; for the intent was, that the defendant should discharge all arrears of rent which incurred before the first of October, but here the breach is, that he did not discharge all charges for which the land was chargeable, which may be extended to many other charges; as appears in 1 Leon. 92, 93.

In covenant breach assigned ought to be positive and certain.

[147]

Secondly, The breach is uncertain, for no answer can be given to such particular charge; Breach, *quod tenementum sui ruinosum & in decasu in diversis partibus pro defectu reparationis*, bad for uncertainty. Bend. 62. pl. 110.

The

De Term. Pasch. 5 Annæ.

Noy. 50.

Dyer 328.

Cro. Jac.

425, 444.

1 Wood.

Conv. 411,

413.

1 Ld. Ray.

370.

Cowp. 242.

1 Term.

Rep. 645.

The plaintiff should shew how the party was disturbed or interrupted, to which direct and positive answer might be given; and if this is not done the breach is not well assigned. Yelv. 30. Cro. Eliz. 914.

So he should shew a breach directly within the words and intent of the covenant. 1 Lev. 246.

Sed adjournatur.

Anonymous. In C. B.

Case 99.

When
proof of a
suggestion
in prohibi-
tion is ne-
cessary.

PROHIBITION, upon a suggestion that the suit in the spiritual Court was for tithes of heath and barren ground improved, within seven years after the improvement, contrary to the statute; and a rule was prayed for a consultation, because he had not proved his suggestion within six months, for the words of the statute of 2 & 3 Ed. 6. c. 13. are general, in case the suggestion for a prohibition be not proved in six months, &c. the party shall have a consultation without delay; and tho' there need no proof of the suggestion, where the suit for tithes is contrary to common right, or where the contract of the party is suggested; yet in other cases it ought to be, as well as upon the suggestion of a modus. Cro. Car. 208. Jones 231. and such suggestion was proved. Dy. 170. b. And to this the Court inclined.

Term. Sanct. Trin.

5 Ann. In C. B.

Anonymous.

Case 100

IN DEBT upon bond for the payment of money the 9th of February, the defendant pleads, that he paid it the 9th of January preceding; and issue, that he did not pay it the said 9th day of January; and upon that a verdict for the plaintiff.

And now it was moved to plead again; for notwithstanding this verdict the plaintiff may be paid after the 9th day of January, and before the 9th day of February, when the condition was that the money should be paid, and therefore the bond perhaps was not forfeited, nor the plaintiff any title of action:

And it was argued by PARKER, Queen's Serjeant, that it was an immaterial issue, notwithstanding it was aided by the statute.

And therefore it was ordered they should plead again.

In an immaterial issue defendant shall plead again, tho' after a verdict for the plaintiff.
Cro. El. 236, 245.
Dyer 119.
1 Bur. 302.
4 Bur. 2146.
3 Bac. Abr. 111, 112, 372.
4 Bac. Abr. 658.
Doug. 396, 747.

Harding and Harding. In C. B.

Case 101

IN DOWER, to the return of a writ of summons the tenant cast an essoin, that was adjourned *ad Crast Martini*, and then the tenant made default, and upon that a grand Cape ought to issue, but a petit Cape was entered, and afterwards an *alias* returned *a die Pasch.* in 5 Sept. and afterwards final judgment was entered, but the plea upon record in which judgment was entered was in Trinity term; and it was moved that judgment was irregular;

First, because that petit Cape was awarded where grand Cape ought to have been awarded.

[149]

Secondly, No continuance was entered in Easter term when the *alias* was returnable, and Trin. term in which judgment was entered;

And

De Term. S. Trin. 5 Annæ.

And upon this it was insisted that these misprisons might be amended, for they are only misprisons of the clerk; for when the effoins roll, which is the warrant for entering the effoin, is inspected, it appears that the effoin was to the return of a writ of summons before appearance, and then a grand *Cape*, and not a petit *Cape* ought to issue; but here the entry is as if the effoin was cast before appearance; misentry of effoin in *assumpsit* was amended 30 H. 6. 1. and the omission of entering an effoin was amended by common law. 8 Co. 156, b.

6 E. 3. 25,
2.
Fitz. Amen.
73.

So in *formedon* where tenant was admitted to prosecute by his *prochein amy*, and that was entered upon remembrance-roll, but upon Philazer's roll entry was, that *quod demandant obtulit se quarto die per J. S. attornatum suum*; but this was allowed to be amended. Lit. 60. *Young's case*.

In this case the attorney for the demandant went to the Philazer, and saw that the tenant had not appeared, and upon this prayed a grand *Cape*, and this was sufficient warrant to the philazer to make the entry, acc^d Yelv. 155. Debt against three executors, and judgment by default, and continuance was for all, where only one appeared, and it was directed to amend if it appeared that all appeared, otherwise not. So the non entry of a cognizance upon record, if it be an antient roll. 35 H. 6. 24 b. So bail omitted to be entered shall be entered if it appears to be allowed. So attachment for summons on declaration, for it appears by original. 2 Cro. 108. Cro. Car. 21. 1 Roll. 207, 814. 3 Bullst. 181. So *Habeas Corpus in placito comp'* for *placito deb'* 23 H. 6. 3. a. *Osten's quare non facerit*. 8 Co. 160. a. And the entry of the petit *Cape*, for the grand *Cape* is only one process for another which is within the statute 32 H. 8. which aids misconveying of process. And where an omission of a continuance entered Easter and Trinity term, this was the default of the clerk, 1 Roll's Abr. 200. pl. 27. 2 Cro. 528. and therefore it should be entered after judgment or error. 1 Roll. 209. l. 5. Hard. 505.

But by the Court the amendment was not allowed.

5 Co. 45,
b.
1 And. 24.
Dalis. 5, pl
9.
N. Benl. 33,
pl. 53.
3 Sa. k. 29.

Term. Sanct. Mich.

5 Annæ. In C. B.

Anonymous.

Case 102

INDEBITATUS ASSUMPSIT by plaintiff as executor of _____, for money due from the defendant to his testator. The defendant pleads, that A. B. was appointed executor to the testator and proved his will, and that the defendant afterwards paid him so much money, being part of the debt, in satisfaction of the whole, and that he on the receipt discharged the defendant. Plaintiff replied, that the probate granted to A. B. was afterwards, upon appeal, annulled by the sentence of the Ecclesiastical Court, and the will by which A. B. was made executor was adjudged to be forged, and the will by which the plaintiff is appointed executor allowed, *absque hoc*, That the testator made such will by which A. B. was appointed executor; and upon this replication a demurrer.

Executor may traverse the devise of an executorship to another. Payment to an executor having a probate. if the probate, is afterwards repealed, does not discharge the party against the legal exe-

In this case two points were argued by the serjeants at the bar.

First, If the traverse was good, for that the defendant having pleaded, that the testator made a will by which A. B. was appointed executor, which was proved in the Spiritual Court, the probate there is conclusive and cannot be traversed; as was resolved 1 Sid. 359. 1 Lev. 235. in the case of *Noel and Wells*, That if the probate of a will be given in evidence that concludes the parties, that nothing can afterwards be given in evidence in contradiction to the probate, as that there was no such will, or that the testator was not *compos*, but only matter consistent with it, as that the party had *bona notabilia*, that the probate was forged, &c.

[151]

Secondly, If the payment to an executor who was executor *de facto*, and had probate of the will, was good to bind the rightful executor.

Judgment was given upon both points for the plaintiff.

TREVOR C. J. gave the reasons of the judgment for the whole Court; and as to the second point he said, that an executor derives all his authority from the testator himself, and

Falm. 412. and that he of himself, as being executor without any thing
 3 Bull. 73. more, has the power of disposing of the estate of the testa-
 1 Roll. rep. tor, of releasing a debt due to the testator, &c. True it
 226. is, before in action brought a probate is necessary, but that
 1 Co. 21. b. is only requisite to ascertain the Court that the plaintiff is
 2 Jon. 67. executor, and has a right to bring his action, not to give the
 3 Keb. 282. plaintiff any title or interest to the estate of the testator.
 Cro. El. 460. If the testator appoints no executor, or dies intestate, the
 Ante 96. administrator is appointed by the ordinary, and derives his
 1 Salk. 38, authority from him; and therefore if administration is grant-
 251. ed, all acts by him as long as the administration continues
 1 Roll. abr. in force are good, and even though it be afterwards re-
 303. pealed. But there is a difference taken when an admini-
 6 Co. 18, stration is repealed upon a citation, or upon an appeal. 6 Co.
 19. 18. b. *Packman's case*. If it is upon an appeal, which sus-
 Moor 396, pends the administration, all acts after such suspension are
 636. void; if it is repealed upon a citation, all the acts of the
 2 Lev. 90, administrator, till the repeal, are good, for by the citation
 55. the grant of the administration is not suspended, therefore
 Raym. 224. if the administration be repealed, all acts done by an admini-
 Brownl. 51. strator, which a rightful administrator might have done,
 Cro. Car. shall be allowed, for in them he acted in the place of the
 62. rightful administrator.
 Style 10. But it is otherwise in the case of an executor, for the pro-
 Lutch. 67. bate of the will gives no authority at all to him, and there-
 1 Lev. 186. fore if he is not the rightful executor he has no authority at
 1 Wood. all, and it would be unreasonable that a person, who has no
 Con. 88. authority, should dispose of the interest of another; the
 2 Stra. 917. rightful executor has not only a trust or authority to admini-
 Fitz. 202. nister the goods of the testator, but also an interest annex
 2 P. Will. to the trust; and therefore the property of all the goods
 578. after administration is completely vested in him; and conse-
 2 Atk. 285, quently the disposition of the goods of the testator, or release
 Ld. Raym. of his debts, is a disposition of the interest of the rightful
 684. executor, and therefore such disposition does not bind him;
 [152] and so it was resolved Rol. Abr. 719. which case was never
 denied, that I heard of. And this case is not like the case
 of an officer, who officiated without legal authority; as the
 deputy of the deputy of a steward, &c. for rightful acts done
 by him are good; for he is an officer *de facto*, and in the
 immediate and open execution of his office, and the parties
 did not know whether he had authority or not.

See ante
 105.

In this case of an executor some mischief may possibly
 happen, but it would be a more general inconvenience, if a
 tortious

De Term. S. Mich. 5 Annæ.

tortious executor should be allowed, to dispose of the right and interest of a rightful executor.

As to the traverse, I think it good ; for whether a will, or no will, is a question triable by a jury ; as is agreed ^{9 Co. 108.}
8 Co. 134. *Tresbam's* case, *Abbot de Strata Mar-* ^{9 Co. 24.}
cella's case ; and the reason is, because the spiritual Court had not the original jurisdiction of the probate of wills, and because as to trial the temporal Courts have *quasi* a concurrent jurisdiction ; and this is not like the cases 1 Sid. 359. and 1 Lev. 235. That the probate of a will concludes a person from saying there was no such will ; but notwithstanding this matter may be brought to trial ; for the producing a will under probate is only evidence that there was such a will ; and tho' it is evidence of so strong a nature that no evidence shall be admitted against it, yet to plead that such a will was proved, is no reason why this matter should not be tried. Therefore judgment was given for the plaintiff.

D E

Termino Pasch.

7 Annæ. In C. B.

Higginson and Sheif.

Cas. 103.

Officer
chargeable
for an e-
scape of a
person,
where ac-
tion arises
out of the
jurisdiction
of the court
by whose
process he
was taken.

ACTION on the case for the escape of one *Wall* taken by the defendant, bailiff of the liberty of the temporal Court of the Archbishop of *Canterbury*, by virtue of a precept issuing out of the said Court, upon a plaint there exhibited in Debt for the plaintiff against the said *Wall* for debt which was alledged to be within the jurisdiction of the said Court; and the plaintiff declares, that the said *Wall* was indebted to the said *Roger Higginson* in 200l. in the parish of *St. Dunstan*, within the jurisdiction of the Court aforesaid; and being so indebted the plaintiff exhibited his plaint in the aforesaid Court of record of the Archbishop, and that upon the plaint aforesaid a certain precept issued, directed to the bailiff of the liberty aforesaid, returnable 17 April 5 Annæ, and was delivered to the said defendant 8 April 3 Annæ, to be executed in due form of law; by virtue of which precept the defendant afterwards, (viz.) the said 8th day of April, in the parish of *St. Dunstan* aforesaid, arrested, and afterwards, to wit, 17 April, suffered him to go at large, *per quod* he lost his debt.

The defendant, *protestando* that the said *John Wall* was not indebted to the plaintiff within the jurisdiction aforesaid, nor that he did arrest the said *John Wall*, for plea says, that the cause of action upon which the plaint was exhibited did arise in *London*, and not within the jurisdiction aforesaid, of which the defendant afterwards, and before the return of the said precept, viz. 15 April, in the parish of *St. Dunstan* aforesaid, had notice.

[154]

To which the plaintiff demurred, and defendant joined in demurrer.

And it was argued by Serjeant *HALL* for the plaintiff, and by me for the defendant; and I did insist, that the plaintiff by his demurrer here confesses that the cause of action
arises

De Term. Pasch. 7 Annæ.

arises out of the jurisdiction of the court, and that the defendant had notice of it before the return of the writ; and then tho' an action upon the case does not lie against the judge, officer or plaintiff, in an inferior Court, when the cause of action arises out of the jurisdiction of the inferior Court, as was resolved Lut. 934, 564. *Gwynne ver. Pool & al'*, yet there it was agreed, that if the judge or officer had or might reasonably have cognizance that the cause of action arose out of the jurisdiction, and they afterwards proceed, actions on the case would lie against them. Lut. 1566. By *Magna Charta*, *nullus capiatur, nullus imprisonetur, nisi per legem terræ*; but by law none ought to be arrested on the plaint of another for debt, covenant, or trespass, in inferior courts, where the cause of action arises out of the jurisdiction. By statute of W. 1, 35. Great men and their bailiffs shall not on the plaint of another attach any one passing thro' their jurisdiction, for contract, covenant or trespass, which does not arise in their power and jurisdiction, and for so doing shall pay double damages; which statute, as to the thing prohibited, was but an affirmation of the common law, tho' as to the remedy, it was introductive of a new law.

If then the arrest was illegal, the not detaining him shall not be penal.

It is true, that upon this statute the remedy shall be by prohibition before the suit commenced, or by prohibition after the suit commenced, and such prohibition after the suit commenced shall not be granted, but after plea to the jurisdiction tendered upon oath before imparlance, for if the defendant in his plea, or by imparlance, admits the jurisdiction of the court, there is no reason that he afterwards, upon a bare suggestion, should oust the Court of the jurisdiction which he had admitted; so if he comes before plea, upon a bare surmise, to oust the inferior court of the jurisdiction, there is no reason that a judge of a superior court should grant a prohibition, upon the bare surmise of the defendant, that the cause of action arises out of the jurisdiction, as this is denied by the suggestion of the plaintiff in his declaration, that it was within the jurisdiction of the Court; and therefore the cases, which say a prohibition will not lie upon such a bare surmise of the defendant, do not prove that the officer might not by such bare information take notice of this, without being subject to an action for an escape.

[155]

If

De Term. Pasch. 7 Annæ.

If an action for false imprisonment was brought against an officer, for an arrest upon a precept out of an inferior Court, when the cause of action arises out of its jurisdiction, this perhaps would not lie; and so it was resolved between *Olliet and Bessy*, 2 Jon. 214. But it does not follow, that an action would lie for not arresting, or for escape after arrest; and so seems 2 Jones 214. where it is said, that it was agreed by the Court, that if a man is arrested tortiously, and afterwards delivered to the goaler, and he afterwards is informed of the tortious taking; (without any fraud in the case) he ought nevertheless to detain the prisoner delivered to him on the arrest, tho' the execution of it was illegal; for if such information be false, and he lets the prisoner go, he is liable to be sued for an escape; but this strongly imports, that if the information had been true, no action for an escape would lie; and if a man may justify the detainer, it does not follow that he shall be subject to an action for an escape, if he does not detain the person.

If a new sheriff has notice by parol of a prisoner's being in execution, he may detain him; but if he does not accept such notice without indenture of the old sheriff, and permits the prisoner to go at large, he shall not be subject to an action for an escape. 3 Co. 72, b. If a man be taken in execution after the writ of *capias* awarded, and before it be delivered to the sheriff, the sheriff may detain him; but if he does not, he shall not be liable for the escape. 1 Roll. 908. Bnt *per cur'*, judgment must be given for the plaintiff; for as the officer might justify the detainer, if he does not detain him he shall be liable for the escape, for he ought not to take upon himself to judge or examine this matter; and *per TRACY* the notice here is not well pleaded, for he ought not to have said he had notice before the escape, and it is not sufficient to say that he had notice before the return of the writ; and a case was cited by Serjeant RICHARDSON to have been resolved in the King's Bench between *Lucking and Benning*, — Annæ, where in an action for an escape against a serjeant of the Counter, upon not guilty pleaded, it was given in evidence for the defendant, that the cause of action arose out of the jurisdiction of the court, and that the defendant had notice of it; and this matter being found special, judgment was given for the plaintiff, for the officer shall not take upon himself to examine that matter. 1 Salk. 201. and in the present case judgment was given for the plaintiff without further argument.

Cro. El.
365, 366.
Poph. 85.
Winch. 108.
3 Co. 52.
1 Mod. rep.
14.
Hardr. 35.
Hob. 266.
2 Roll. Abr.
457.
Bulf. 70.
[156]
2 Leon. 54.
4 Bac. Abr.
455.

Vide Stat.
3 Geo. 1,
c. 15.
98, & 20.
Geo. 2, c.
37.

De Term. Pasch. 7 Annæ.

ment. Vide 2 Mod. Rep. 30. where the contrary was resolved by three judges. 3 Keb. 849. Vide stat. 3 Geo. 1, c. 15, 88 & 20, Geo. 2, c. 3.

Landon and Bessingham. In C B.

Case 104

DEBT by an administrator; defendant pleaded in abatement, that A. made his will, which after administration granted was proved by the executor; upon which plaintiff demurred.

And the question was, if the plea was good without the traverse, *absque hoc*, that A. died intestate?

Serjeant CHESHIRE: Here the defendant has confessed and avoided the matter alledged, and then there is no occasion for the traverse, 6 Co. 24, *Heliar's* case, for the title upon which the plaintiff relies, is that he is administrator. But the plea that A. made his will, which was proved by the executor, destroys his title as administrator, if A. made a will he could not die intestate, if the will continues in force, as it appears to be, otherwise it could not be proved. If issue had been joined, that A. died intestate, and the plaintiff had produced his letters of administration, and the defendant had produced a will under probate, that had been conclusive evidence against the plaintiff that A. did not die intestate; and here if that matter had been traversed, nothing further could have been given in evidence to prove the traverse than what is now pleaded. I grant it was resolved Yelv. 115. that a traverse was necessary in this case, but the cases there cited are part *pro* and part *con*.

But it was resolved in this case by the Court, without any difficulty, that the plaintiff ought to have traversed, *absque hoc*, that the said A. died intestate, for the plea is not a full confession and avoidance of the plaintiff's title without such traverse; for as the plaintiff alledges himself to be administrator of A. and the defendant says that A. made his will, which was proved, this is not an absolute avoidance of the plaintiff's title, but only by argument or implication, and perhaps the probate was afterwards revoked or another will made, of which the plaintiff shall have the advantage upon the issue tried, and though the producing the will under probate is conclusive evidence against the plaintiff who cannot prove that there was no such will, or that it was forged, yet it is but evidence; and there are many cases where what is sufficient evidence

If a plea be to an action brought by one as administrator, that A. made an executor, he ought to traverse that A. died intestate. Cro. Car. 581. Yelv. 221.

[157]

De Term. Pasch. 7 Annæ.

to prove a thing, is not sufficient to be pleaded, as in trover a demand and refusal is sufficient evidence of a conversion, but will not be sufficient to be pleaded.

Case 105

Plea in abatement shall not be avoided by another original.

James and Mathews. In C. B.

IN an action of TRESPASS, the defendant demanded Oyer of the original, and on the original there appeared a fault in the addition of the defendant, which the defendant pleaded in abatement.

Plaintiff replied and shewed another original, and concluded with the traverse, *absque hoc*, that the action was founded on the other original; upon which the defendant demurred.

First, For that the traverse was of a matter not alledged by the defendant's plea, for the original shewn upon the Oyer is no part of the defendant's plea, but the Court gives the Oyer.

Secondly, For that the plaintiff ought to have concluded *et hoc parat' est verificare per Recordum*; for, as the plaintiff alledges an original which warrants his action, defendant had nothing to say but that there was no such original, which being matter upon record ought to be tried by the record.

[158]

Thirdly, That the replication concludes with a demand of damages.

And for these reasons, judgment was for the defendant.

Athol & al' In C. B.

Case 106

A person is chargeable to the militia levy, though it was not exercised.

REPLEVIN. The defendants plead, that the plaintiffs have such an estate in common, for which they were charged to contribute to find a horse in the militia, and that a warrant was granted by the deputy lieutenant of the county, against the plaintiffs, to summon them at such a day to shew cause why they did not pay the sum charged upon them, but that the plaintiffs did not appear at the day; upon which a warrant was directed by the deputy-lieutenant to the defendants, to levy the sum charged upon the plaintiffs by distress; by virtue of which the defendants justify themselves.

Plaintiffs

De Term. Pasch. 7 Annæ.

Plaintiffs replied, that the militia did not exercise that year, and upon that defendant demurred, and judgment was given for the defendants, by the whole Court, for the defendants being officers have a warrant directed to them by the deputy-lieutenants who have cognisance of the matter, and it is nothing to the purpose that the militia was not exercised that year, for perhaps a sum was charged upon the plaintiffs to be paid annually, for when the militia is exercised, he who finds the horse will be at great expence, and those who are contributory pay a small sum annually for their proportion; then as the plaintiffs had a day upon the summons and did not appear, the warrant afterwards was for their default, and sufficient to justify the defendants.

L 2

DE

Term. Sanct. Trin.

7 Annæ. In C. B.

Case 107 Edmund, administrator (during the minority of Anne his wife) of Patience Maud, *ver.* Shaler.

Administration during the minority of another shall not cease till his age of twenty-one years.

Salk. 39,

42.

6 Mod. 304.

1 Rol. Abr.

888.

Cro. Eliz.

602.

N. Lutw.

102, &c.

Goldf. 136.

2 Brow. 83.

Hob. 150.

3 D. G. 351.

p. 4, S. C.

1 Salk. 23

M. d. 395.

Proc. chan.

175.

Ante 110.

Ld. Raym.

667.

IN DEBT upon bond for 400l. against the defendant, plaintiff as administrator aforesaid averred, that *Anne* his wife was under the age of twenty-one years. Defendant pleads in bar, that *Anne* was above the age of eighteen years. Plaintiff demurs.

It was urged by Serjeant PRATT, that administration during minority determines when the person for whose minority it was granted is seventeen years of age.

But Serjeant CHESHIRE on the other side urged, that there was a difference between administration granted during the minority of an executor, and administration granted during the minority of one who is intitled to the administration; for in the first case the administration determines when the executor attains the age of seventeen years; for at that age the executor, by the spiritual law, is able to take the executorship upon himself, of which our law takes notice; but in the case of an administration that is granted by the authority of the statute 31 Ed. 3. c. 11, the person who has administration granted to him, ought to be capable by our law, by which the legal age is twenty-one, and consequently administration granted to another during his minority, does not determine till his age of twenty-one years; and this distinction was agreed in the case of *Thomas and Frecke*, 13 W. 3. Rot 102. and in other cases there cited, the court seemed at first to doubt; and I mentioned, that it was so resolved in the case of *Thomas and Frecke*, which case I argued; and the court of King's Bench principally relied upon this reason, that administration was granted by virtue of the statute 31 Ed. 3. c. 11. and consequently the age when an administrator ought to take the administration upon himself must be the full age allowed by our law.

[160]

De Term. S. Trin. 7 Annæ.

The Court took time to consider, but afterwards being attended with the record of the case of *Thomas ver. Freeke*, and being informed by some of the spiritual Court, that for forty years past the usage there was to grant administration only to persons of the age of twenty-one, and not to grant administration till the person intitled to it attained his age of twenty-one, judgment was given for the plaintiff.

Note ; The age of seventeen years allowed to be the age when an executor may take the executorship upon himself, is in conformity to the spiritual law, which allows an infant of seventeen years to be proctor or agent for another.

Abbot *ver.* Burton. In C. B.

Case 108

Settlement
by heir on
the part of
the mother,
to the use
of himself
in fee,
shall be to
the old use.
2 Salk. 590.
2 Mod. 286.
1 Co. 105.
Cro. Car.
161.
2 Lev. 60,
79.
Cro. El.
727, 840,
792.
Rep. A. Q.

IN Ejectment upon a special verdict the case appeared to be this :

Stone seised of lands as heir on the part of his mother leaves a fine and suffers a recovery, and declares the use to himself for life, and then to his wife for life, then to the first and other sons in tail, remainder to his own right heirs ; and if the fee was in him as the old use, and should descend to the heirs of the part of his mother, or should descend to the heirs of the part of the father, was the question.

And after argument it was now resolved by the whole Court, that it was the ancient use, and should descend to the heirs of the part of the mother ; and TREVOR C. J. gave the opinion of the Court.*

181, S. C. Show. 92. 1 Inst. 73. 10 Co. 76, b. Owen 126. Moor 575. 2 And. 131. Pig. Recov. 139. 2 Lev. 154. 1 Wood. Conv. 540. Barnes. 216. Ld. Raym. 402. 2 Bac. Abr. 319, 497. Cowp. 379.

* No difference between express and implied use. 2 Salk. 775, 776. Vide 2 Salk. 576. 1 Saund. 260, 261. 1 Salk. 231. 3 Lev. 94, 209, 233, 406.

D E

[161]

Termino Paschæ.

8 Ann. In C. B.

Case 109 Thomas Harvey, Executor of R. Harvey, *versus*
William Richardson & ux', Executrix of R.
Burgefs.

Plea of the
perform-
ance of a
will gene-
rally, is bad.

DEBT upon a bond 1 Oct. 1675, in which *Jos. Burgefs*, and *Richard Burgefs*, the testator of the defendant, were bound to *Richard Harvey*, the testator of the plaintiff in the sum of 160l. The defendant demanded Oyer of the bond and condition, which recites that *Samuel Leach* by will, 11 December 1674 gives to his two sons *Samuel* and *John* 30l. a-piece, to be paid at their respective ages of 21 years, and to his daughter *Mary* 20l. to be paid at her age of 18 years or marriage; and if any of his children died before his legacy became due, the same should be divided amongst the survivors, and of such will made *Elizabeth* his wife executrix; that a marriage was intended between the said *Elizabeth* and *Joseph Burgefs*, whereby the personal estate of *Samuel Leach* being estimated at 400l. would come to his hands, if therefore the said *Joseph Burgefs*, his executors, administrators or assigns, should perform the said will as to the said legacies of 30l. a-piece given to *Samuel* and *John*, and as to the said legacy of 20l. given to the said *Mary* the children, then the obligation should be void.

[162]

And upon this the defendant pleaded, that the said *Joseph Burgefs* did well and truly perform the said will as to the said legacies of 30l. therein given to the said *Samuel* and *John*, and the said legacy of 20l. given to the said *Mary*, according to the form and effect of the condition aforesaid: to which plea the plaintiff demurred, and shewed for cause, that the defendants do not shew how the said *Joseph Burgefs*, performed the said will, nor whether he paid the said legacies or not, and that the said plea is uncertain,

De Term. Pasch. 8 Annæ.

certain, and informal, upon which issue cannot be joined ; and the defendants joined in demurrer.

And now it was argued by Serjeant CHESHIRE and myself for the plaintiff, and resolved by the Court, that the plea is bad, for it is too general, upon which the plaintiff could not join in issue, for it does not appear whether the legacies were paid, or whether any one was dead, whereby his legacy should be given to the survivors, nor when, or in what manner they were paid ; and therefore the plea was bad upon the reasons of the cases 2 Cro. 360. 2 Bulst. 266. Lutw. 420. and though the replication might have aided the plea, yet that is not necessary ; but the incertainty of the plea being shewn for cause of the demurrer, judgment must be given for the plaintiff.

Serjeant HALL of counsel with the defendants, would have taken a distinction where the obligation recites the certainty of the legacy, and where not, as in 2 Cro. 360. it does not appear how much was given for the legacy. *Sed non allocatur.*

Hole & ux', Executrix of A. *versus* King. Case 110
In C. B.

IN an action of trover, the plaintiff declared that the testator was possessed of the goods in question, and being so possessed made his will, and the plaintiff executrix, and died, after whose death the goods came to the hands and possession of the defendant by his finding them, who converted them to his own use.

Where executor shall pay costs in trover.

Not guilty pleaded, and the plaintiff was non-suited.

And now it was moved by Serjeant PRATT, that the plaintiff ought not to pay costs, for he does not ground his action upon his own possession of the goods, and therefore though the conversion was in his time, yet the plaintiff never had an actual possession of the goods, but only a possession in law, and therefore ought not to pay costs ; and this seems to be within the reason of the case of *Hunt and Balloe* now lately settled and resolved in this court, where an action of trover was brought by plaintiff as executor, of goods of his testator, which the defendant had taken and converted to his own use, and it was there adjudged, that the plaintiff should not pay costs, and the

De Term. Pasch. 8 Annæ.

the reason seems to be, for that the executor never had the possession of the goods.

But the Court resolved here, that the plaintiff should pay costs, for his testator died possessed, and then the property and possession was vested in his executor, and then the trover and conversion by the defendant was in his time, and therefore he might have had an action in his own name without alledging himself executor.

But in the case of *Hunt* and *Balloe*, tho' the trover and conversion was alledged in the time of the executor, yet there it appeared that the testator did not die in possession of the goods, and therefore there is a difference between the cases.

D E

Term. Sanct. Trin.

[164]

8 Annæ. In C. B.

Hopewell ver. Ackland.

Case 111

IN EXECUTEMENT upon a special verdict the case appeared to be this:

John Ackland, seised in fee of the lands in question, made his will in writing to this effect:

Devise,
when it
gives an e-
state in fee.
1 Salk. 239.

Whereas I have given my bond to leave my manor of *Buckley* to the daughter of my brother *James Ackland*, and the heirs of her body, if she live to attain the age of 21 years, but if she die before she attain that age, then it is to return to me again; if therefore my said brother's daughter shall happen to die before she attain her age of 21 years, I give the said manor to my brother *Richard Ackland* and his heirs; also I give to my brother *Richard Ackland* all my land, tenements, hereditaments whatsoever; also I give to my brother *Richard Ackland*, all my goods, chattles, monies, debts, and whatsoever else I have in the world not before by me disposed of; he paying or securing to be paid all my debts and legacies, and I make my said brother *Richard Ackland* my whole and sole executor of this my last will, and desire B. to be overseer thereof, and to see that my said executor and his executors pay the said debts and legacies. And by the same will he devised some small annuities for life, and others to charities in fee, and died. The daughter of his elder brother attained her age of 21, and claimed not only the manor of *Buckley*, but also all the other lands of the testator after the death of *Richard Ackland*, who was now dead.

These
words in a
will carry a
fee.
2 Vent. 285.
Mod. cases,
233.
3 D. 201,
p. 7, S. C.
1 Wilson,
333.
Post. 337,
338, 339.
[165]

The question was, Whether by this will *Richard Ackland* had an estate in fee in those other lands, or only an estate for life? For it was agreed, that if he had but an estate for life, then the lessor of the plaintiff, who was heir at law of the testator, had a good title; but if he had an estate

estate in fee, then the title was with the defendant, who was son and heir of *Richard Ackland* the devisee.

This case was argued last term by Serjeant PRATT for the plaintiff, and by Serjeant PARKER for the defendant, and now by Serjeant POWIS for the plaintiff, and by Serjeant CHESHIRE for the defendant.

And it was insisted for the plaintiff, that *Richard Ackland*, the devisee had but an estate for life; for the first clause which relates to the manor of *Buckley*, and the second clause which gives all his lands, tenements and hereditaments, and the third clause which disposes of his personal estate, are all distinct and independent clauses.

The first clause is particular, and recites, That whereas he had given bond to leave his manor of *Buckley*, in such a manner, if therefore his brother's daughter died before her age of 21 years, then he gave his manor of *Buckley* to his brother *Richard* and his heirs; if it should be attempted to couple this clause with the subsequent clause, they must be taken together throughout, and then not only the manor of *Buckley* will be devised to his brother upon the preceding condition, viz. If the daughter dies under age, but also all the other lands will be devised upon the same condition; then if this clause governs the subsequent devise of all his lands, tenements, and hereditaments, and limits them also to his brother and his heirs, then it must necessarily be that all his lands, tenements and hereditaments, are devised to him only in case the daughter dies under the age of 21 years: for the defendant shall not take only part of this clause and annex it to the subsequent clause, but must join the whole precedent clause with the subsequent one, or nothing; and if the whole is conjoined, the subsequent devise will be upon condition that the daughter die under the age of 21 years, as well as the former; which construction the defendant will hardly approve of, for the daughter did attain her age of 21 years, and then *Richard Ackland* will take nothing by the will. It was likewise observed that the testator in the first clause had taken notice of what words were necessary to create a fee, for there he devises the manor of *Buckley* to his brother and heirs.

It was insisted that the second clause is distinct from the first, and no way relates to it, nor is to be governed by it, for the second clause commences *de novo*. Also I give to my brother *Richard Ackland*, all my lands, tenements and hereditaments, without adding the

the copulative *and*; the word *also* imports no more than *item*, and is of the same signification as *moreover*, and cannot be construed *in like manner*, as if the deviser had said, I give my manor of B. to my brother and his heirs, in like manner I give him all my lands, tenements and hereditaments whatsoever. But this subsequent clause is distinct and stands by itself, and there is a manifest difference where the first clause is compleat, and the second is attendant upon it, and must be construed with it, and cannot be construed by itself, there the second clause shall be governed by the first; as if a man devises Blackacre to A. and his heirs, and also Whiteacre, there the devisee shall have Whiteacre also in fee, for there are no words which can make the subsequent words a distinct and compleat clause; and therefore they must be governed by the words of the first clause; but where the second clause repeats the words, by which it may have a construction by itself, then it is a distinct and compleat clause and has no relation to the former; as where a man devises Blackacre to A. and his heirs, and I also devise Whiteacre to A. there by the second clause A. has only an estate for life; for there the verb *I devise*, and also the name of the devisee is repeated, and therefore it is a distinct clause, and does not depend upon the precedent clause; and in this distinction the cases are agreed. Mo. 52. is stronger, for there a man by his will devises land to Henry his son; *Item*, I give to my son Henry and his heirs; and there the doubt was, whether by the first clause Henry had a fee? And it was resolved by three judges, that he had not, for that they were distinct clauses.

[167]

But WESTON differed, because the latter clause had the word *heirs*, which he thought was applicable to the whole; but he agreed, that if the word *heirs* had been in the first clause, it would be otherwise; and therefore three judges have agreed the law to be as we contend for in a case stronger than ours, and the whole court agreed it to be so in a case the same as ours.

Then if the second clause be considered by itself, I give all my lands, tenements and hereditaments to my brother Richard Ackland, that can pass only an estate for life; for it is the known rule, that a devise to one indefinitely, without limiting any estate to him, gives him only an estate for life. It is true, if a man devises to another all his estate in such lands, this passes the fee; so if he devises to him all his inheritances; but no one can think it is so intended by a devise of all his hereditaments, who considers the difference between

Heredita-
ment im-
ports an in-
heritance.
2 Lev. 169.

between the two words *hereditas* and *hereditamentum*; for the word *hereditas* imports the estate which a man has in the land; *hereditamentum* the land itself which may be inherited; and therefore cannot be applied to the estate in the land, especially when it is coupled, as here, with other words of the same import; for the devisor gives to his brother all his lands and tenements; no one will say that those words import more than the things themselves; when therefore the devisor adds, *and all his hereditaments whatsoever*, that denotes only such things as were not comprehended under those other words *lands and tenements*, but cannot be extended to the estate in those hereditaments, any more than the other words can be extended to the estate which the devisor had in the lands and tenements.

[168]

Then if the third clause be considered, Also I give to my brother *Richard Ackland* my goods, chattels, debts, monies, and whatsoever else I have in the world; the words, *whatsoever else I have in the world*, are very extensive; but if those words were singly by themselves, it would be hard by such general words to pass lands, which could not be devised by common law, but only by the statute, or by custom; and therefore the heir, who by the common law could not be disinherited by any devise, shall not now be disinherited, but where the words are plain and manifest for that purpose.

Raym. 97.
1 Sid. 191.
1 Lev. 13.

The rule in *Vaugh.* — is, that the heir at law shall not be disinherited by implication, except where the implication is necessary; it is not sufficient that it be possible or probable; and all that can be said in this case is, that it is possible, or at most that it is probable, that the testator here intended to give all his lands to the devisee. Where a man devised *All to his mother*, those words were as large and comprehensive as the words *All I have in the world*, yet it was resolved nothing passed but the personal estate.

But whatever construction might be put upon those words, if they are by themselves, yet as they are here coupled with personal things, they shall not be extended to words of another nature.

There are other cases where words very general and indefinite shall be construed in conformity with and analogy to other words in the same case. 2 Co. 46. 47. b.

But on the other side it was insisted for the defendant, that the several clauses, each by itself, or at least taking them altogether, gave a fee to the defendant *Richard Ackland*;

De Term. S. Trin. 8 Annæ.

land; and in Hill. Term 8 Ann, judgment was given by the whole Court for the defendant.

And TREVOR C. J. delivered the opinion of the whole Court, and said, that the first clauses cannot be joined, for as the devisor gives to his brother *Richard Ackland*, and his heirs, his manor of B. &c. and afterwards adds, Also I give to my brother *Richard Ackland* all my lands, tenements and hereditaments, the last is a distinct clause; the case in *Mo. 844.* — does not come up to this, for there the name of the devisee was not repeated in the second clause, and therefore it necessarily must be coupled with and construed with the first. 2 Lev. 196.
Yelv. 210.
1 Roll. Ab.
1 Sid. 105.
1 Vent. 299.
2 Jones 57.
2 Mod. 130.
Pollex. 185.
[169]

Then the second clause, by which he gives all his lands, tenements and hereditaments to his brother, gives him but an estate for life.

But the last clause by which he devises to his brother All his goods, chattels and personal estate, and whatsoever else he has in the world, these last words, Whatsoever else he hath in the world, import more than was said before, All his goods and chattels, (for those words contain all his personal estate) and therefore the additional words must go to something else. Alleya 28.
2 Vent. 285.

If a man devises all the rest and residue of his estate, that is sufficient to give the devisee, not only his lands not before disposed of, but also the estate not disposed of, (viz.) the remainder and reversion of land devised to another for life, &c.

And the words, Whatever else he hath in the world, are tantamount, especially when the devise is, paying or securing to be paid his debts and legacies, and some of the legacies were in fee, and not properly payable out of the personal estate. Judgment for the defendant.

Fitzherbert versus Chancellor and Scholars of the University of Oxon and Reeves, Clerk. Hill. 7 Case 112
Annæ, in C. B. Rot. 337.

QUARE IMPEDIT by *Jane Fitzherbert* for the church of *Swinerton in Com' Stafford.* The plaintiff declares, that *Bazil Fitzherbert* was seised in fee of the manor of *Swinerton*, with the advowson appendant, and by indentures 7th and 8th of January 29 Car. 2. conveyed the same to the use of himself for life, and after to the plaintiff his wife condition. Conviction of a papist where good. Avoidance of a church before conviction, forfeited by the wife condition.

[170] wife for life; that *Bazil Fitzherbert* afterwards presented *John Plant*, clerk, and died; that the church afterwards became void by the death of the said *John Plant*, by which the plaintiff had a right to present, but the defendants disturbed her.

The Chancellor and Scholars by their plea confess that *Bazil Fitzherbert* was seized, conveyed, and died, and that the advowson became void, *ut supra*; but that by the statute 23 Eliz. it was enacted, That every person who should forbear to repair to divine service contrary to the statute 1 Eliz. and should be thereof convicted, should forfeit 20l. of which the Justices of Assize, Oyer and Terminer and gaol-delivery, and justices of peace at their quarter-sessions, should have cognizance; that by the statute 28 Eliz. it was enacted, that for the more speedy conviction of such offenders, if upon indictment of such offenders proclamation should be made at the assizes, &c. that such offender should render himself before next assizes; and if he should not appear at the next assizes, on the recording such default the offender should be convicted.

That by the statute 3 Jac. it was enacted, that every Popish recusant during his remaining convicted, from and after the end of that Session of Parliament, should be disabled to present to any benefice, &c. and that the university should present to every such benefice, &c. in the county of *Stafford*, &c. which should happen to be void during such time as the patron thereof should be and remain a recusant convicted.

That by the statute 1 W. & M. it was enacted, that any two or more justices of the peace, who should suspect or be informed that any person was a papist, should tender to such person the declaration in the statute 30 Car. 2. and if he should refuse to repeat and subscribe such declaration, or to appear before the justices of the peace upon notice left at his most usual place of abode by any person authorised thereto by warrant under the hands and seals of such justices of the peace, such person should thereafter be disabled, and become liable to the penalties and disabilities of a popish recusant convicted, and the justices should certify the name and abode of every person so refusing to the next quarter-sessions there to be recorded.

That by the statute 1 W. & M. it was enacted, that every person who should refuse to repeat and subscribe the said declaration, or to appear, &c. as in the last act is directed, whose name and abode should be thereon certified and re-

corded

De Term. S. Trin. 8 Annæ.

corded at the general quarter-sessions, from and after the time of such record made should be disabled to make any presentation, &c. of any benefice, &c. as fully as if he had been a popish recusant convict, and that the university should present, &c. [171]

That 27 Mar. 7 Annæ Ralph Bucnal & Richard Dyett, duo iussu ad pacem, &c. informati fuerunt quod querens suspectus fuit fore papista, quodque noticiæ inscriptæ per quendam R. A. authorizatæ virtute warrant sub manibus & sigillis dictorum duorum iustorum relictæ fuit pro querens; sed prædictus querens non comperuit, and that the justices certified the default to the quarter sessions, which was there recorded; per quod & vigor stat prædictus the Chancellor and Scholars to the church per mortem prædicti Johannis Plant vacantem & adhuc vacantem existentem, prædictus querens inhabilis virtute stat prædicti ad præsentandum remanens, præsentaverunt the defendant Reeves, &c.

The defendant Reeves pleaded the same plea.

Plaintiff replied, that the church vacavit per mortem prædicti Johannis Plant 29 April 6 Annæ, and that the plaintiff, 7 June proximi did present to the bishop of Litchfield and Coventry idoneam personam, (viz.) quendam Johannem Walsorne, but the bishop admittere penitus neglexit & recusavit ac prædictus Cancellarius & Scholares & prædictus Reeves (defendants) eundem (querens) in præsentatione illâ injuste impediabant, de quo quidem impedimento postea & infra sex menses, &c. ac diu antequam prædictus certificatio in placito prædicto mentionatæ recordatæ fuit, &c. (viz.) 23 Julii 6 Annæ, breve suum originaliter, &c. impetravit, &c. & superinde narravit pro impedimento prædicti versus prædictum defendens.

To this replication the defendants demurred, and the plaintiff joined in demurer.

SERJEANT PRATT insisted, that though the plaintiff had presented to this advowson, yet she being convict for recusancy before institution and induction, the university had title to present. For the statute 1 W. & M. sess. 1. cap. 8. which says, that a person suspected to be a papist shall have notice, &c. and if he refuse to appear, &c. such default shall be recorded, and from and after the time of such record made shall be disabled to make presentment, relates to the statute 3 Jac. 1. cap. 5. and shall be construed as if the statute of 3 Jac. 1. c. 5. was expressly repeated, and the statute 3 Jac. 1. c. 5. says, that every popish recusant, during his remaining convict, from and after the end of that Sessions of Parliament shall be disabled to present to any benefice, &c. by which [172]

which it appears, that every person convict for recusancy is disabled from presenting to any benefice, and there is no difference where the person is convicted before the avoidance happens, or after, for in both cases the law excludes his power of presenting, and intrusts the presentation with the University.

And admitting the University be intitled to the presentation when the patron is convict for recusancy after the avoidance, then the case will not be altered because the plaintiff had presented before conviction, and being disturbed in her presentation by the University, had brought her *quare impedit* for such disturbance before her conviction was recorded; for though the disturbance was before the title of the plaintiff was avoided, yet if the title of the plaintiff be avoided before the plaintiff recovers, she cannot recover, nor have damages for the disturbance; for the disturbance does not prejudice the title of the plaintiff, which is afterwards avoided by act of parliament, before the plaintiff could have recovered upon that title. The plaintiff shall not have damages for the disturbance till he has judgment; and no one shall have judgment for damages in *quare impedit* when he cannot have a writ to the bishop. Co. Litt. 362.

And notwithstanding the objections in this case, it appears there was a regular conviction according to the directions of the statutes. The first objection is, that it does not appear that the plaintiff was duly summoned, and refused to appear before the Justices, but only, that notice, &c. was left at the mansion-house of the plaintiff, without saying it was at that time *tunc domus mansional* of the plaintiff; but when notice is given at his mansion-house, that is not true, if it is not then his mansion-house, and *mansional domus* imports that it was so then. The second objection is, that it does not appear that the persons before whom the conviction was were then justices of the peace; for it is only said, that information was given to such and such *justi domini regis ad pacem*, &c. without saying *tunc existen' just' ad pacem*, &c. but when the conviction is before justices of peace, who act in their judicial capacity, it shall be intended that they have then a good authority, when it appears that they ever had an authority; for their authority shall not be presumed to be determined, but to have continuance till the contrary appears; and though there are many cases in indictments, where it must be alledged they were *tunc just'*; yet they do not

De Term. S. Trin. 8 Annæ.

not extend to pleas in bar, which are sufficient to a common intent.

And it was argued by Serjeant WELD, and now by Serjeant LLOYD for the plaintiff, who insisted, that the conviction was not till after the avoidance happened; and therefore the avoidance was a chattel vested in the plaintiff; and she had executed her authority to the presentation before the conviction, and therefore the conviction cannot by relation defeat what was absolutely executed *quoad* the plaintiff before. The words of the statute are, That from and after the certificate of the default recorded, such person shall be adjudged a person disabled to make a presentation; but there the presentation was made before such certificate. To which Serjeant PRATT replied, that though a person could not be adjudged *inhabilis* till the certificate is recorded, the question is, whether, when he is adjudged disabled, this does incapacitate him from presenting to avoidances which happened before the certificate recorded, as well as to avoidance after.

Afterwards in Michaelmas Term 8 Annæ, this case was again argued by Sir THOMAS POWIS premier Serjeant for the plaintiff, and by Serjeant CHISHIRE for the defendant.

And for the plaintiff it was insisted,

First, That by this plea there did not appear to be a legal conviction, and he did not waive the exceptions taken to the conviction by the counsel who argued before him, viz. that the plea shewed that information was given to *R. Bucknall* and *R. Dyett*, two justices of the peace, that the plaintiff was a papist, that she had notice by A. B. by warrant of the said justices, but does not say *adtunc justic*; and perhaps they were not then in commission, though they were at the time of the plea: Also that it is said, Notice was left *ad mansional dom* of the patron, without saying *adtunc dom' mansional*. [174]

Secondly, That it does not appear, that the plaintiff refused to appear before the justices according to the summons; for the summons was to appear before the said two justices & *al' just*; and it is alledged only, that she did not appear before the said two justices; but perhaps she appeared before the others.

Thirdly, That it does not appear, that the plaintiff refused to appear, but only says *quod non comperuit*.

Fourthly, That it does not appear that the church was void at the time of the plea, but only that it was vacant by

M

the

the death of *Plant*, and so remained to the time of the information to the justices.

But the exceptions which he principally enforced were, that here it does not appear by the plea, that the justices of the peace were present at the time and place, when and where the plaintiff was summoned and appointed to appear before them; and when a man pleads a matter which shews a default in another, he ought to shew that all the particulars were observed which render that default inexcusable; as if a man pleads a default of a tender of rent, it is not sufficient to say that the rent was demanded, and there was no body ready to pay it; but he must alledge, that he was at the time and place of payment, and continued there a reasonable time, (*viz.*) till sun-set, ready to receive it.

[175] So in covenant for levying a fine, &c. it is not sufficient to say, that the party did not levy it, but he must shew that he on the other part took out a writ of covenant, &c. and did all that was to be done on his part; and it is here to be considered who ought to do the first act; for if he does not do all on his part, *it shall not turn to the disadvantage* of the defendant, that he did not do his part: And therefore, where the justices of the peace summon another to appear before them at a certain time and place, it ought to be alledged in the plea, that the justices were ready at the time and place assigned to tender the oaths and declaration required; and it is the stronger, that the justices are not a Court which have a certain fixed time to assemble, but have an authority for this particular purpose only.

Secondly, The plea ought to shew that the plaintiff refused to appear before the justices which granted the summons and before any other justices, for this statute 1 W. & M. refers, as to the manner of conviction, to another act of the same session cap. 8. by which it appears that any justice of the peace has power to tender the oath and declaration; then when the two justices summon the party before them or any other justices, if the party appears before other justices, it is as well as if she appeared before the two justices who granted the summons.

But if there appeared upon the plea to be a good conviction, yet it was too late; for it appears upon the record, and is now confessed by the demurrer, that the plaintiff at the time of the presentation, at the time of the disturbance, at the time of the action commenced was not convicted, nor summoned before the justices, for the declaration *in quare impedit*

De Term. S. Trin. 8 Annæ.

impedit was in Mich. Term — the information before the justices, upon which the plaintiff was summoned to appear before them, was not till March following.

The case of the Chancellor of *Oxford* 10 Co. 53. b. is not parallel to the present case, and I do not observe it to be urged on the other side; for there the statute 3 Jac. 1. cap. 5. which avoids grants of the next avoidance by the express words of the statute, has relation to the time of the session, and there is a reason for it; for if the grant of a benefice shall not be void till conviction, yet upon the summons in order to a conviction, the person so summoned would grant the advowson, which mischief cannot follow in the present case.

The patron here then at the time of the presentation was a person qualified to present, when the avoidance happened, she had an interest or right vested in her to present, and when she had presented a fit person, she had performed her office and had nothing farther to do. When an avoidance happens, that the interest in that is vested in the patron, is manifest, for if the patron after the avoidance happens dies, his executor or administrator shall present.

[176]

If there be tenant *pur auter vie* of an advowson, which becomes void, and before presentation *cessuy que vie* dies, yet the tenant *pur auter vie* shall present.

So if there be a guardian of an infant seised of an advowson, and there is an avoidance, and before presentation the infant comes of age, yet the guardian shall present.

But in our case not only an interest was vested in the patron before the conviction, but the patron had executed her power by an actual presentation of a person *qui fuit idonea persona*, and so it here appears upon record.

It was said that a presentation is not an execution of the authority of the patron, for he may revoke his presentation at pleasure, and for that were cited the cases in *Latch* 191, 253. 2 Roll. Abr. 353, 354. But this I deny.

It is true the king may revoke his presentation by his prerogative, *Fitz. Nat. Brev. — Hob. 214.* But there being cases which take notice that it is the prerogative of the king to do this, imports that a common person cannot revoke his presentation, and so it is expressly said, *Fitz. Nat. Brev. 79.* 7 H. 4. 32.
Dyer 260.
25 Ed. 3. 47.

The civil law takes notice that an ecclesiastical person cannot revoke his presentation, but a lay person may *variare præsentationem*.

[177] *presentationem* or *accumulando variare*, as some books say, but it is not said by the civilians that a lay patron can revoke his presentation, but can vary it, that is, can present another, or *accumulando variare*, that is, can present one and another *toties quoties*, and then the bishop may take one presentee or other which he pleases; which shews that by their notion the lay patron cannot revoke, but only vary, which does not amount to a revocation of the first presentation, for then the bishop could not take the first presentee. And this all which *Roll* says.

He takes notice that by the Scotch law an ecclesiastical patron cannot vary his presentation, but a lay patron may *variare* or *accumulando variare*, and for that quotes *Skeen's Reg. Majest.* — which is so; and then concludes, that by our law a lay patron cannot revoke, which is an express authority for us.

When the patron has presented *Idoneam personam*, he has done all that belongs to him to do. *Goldf.* 103. says, that to an intire and complete plenarty are required the act of the patron, viz. to present a fit person, and when he has so done *funct' est officio*, the act of the ordinary to give institution, and the act of the incumbent to procure intluccion; and by this rule when the patron has presented, he has done all that lay in him to do.

And by such presentation an interest is vested in the person himself who is presented; it is true that *quare impedit* must be brought in the name of the patron and not the incumbent, but the incumbent may sue in the spiritual Court to get admission by *duplex querela*, though perhaps the temporal Courts would upon such a suit grant a prohibition.

But if the plaintiff here could not have a writ to the bishop, yet the suit in *quare impedit* being well commenced, he may proceed for damages; and I deny the rule laid down on the other side, that the plaintiff shall not have damages in a *quare impedit*, where he cannot have a writ to the bishop. The case *Co. Lit.* only says, that the defendant cannot have damages, because he cannot have a writ to the bishop; but the plaintiff may have damages, though he cannot have a writ to the bishop. If there be a *quare impedit* against the disturber and the incumbent, without naming the bishop, and pending the writ six months pass, upon which the bishop collates for the lapse (as he may do in such a case) though the plaintiff has judgment, he cannot have a writ to the bishop to admit his clerk, for the church

De Term. S. Trin. 8 Annæ.

is full, but he shall have damages; and the statute West. 2. which gives costs in *quare impedit* provides expressly for such case, for by that statute it is enacted, that the jury inquire of four points, if the church be full, and whose presentation, &c. if it be full, he shall have two years value, damages.

In the present case the avoidance happened, and the interest in it vested in the plaintiff before conviction; the plaintiff upon that presented, being then capable of presenting, and by her presentation had executed her power, and if the presentee had been then instituted and inducted, it would without question have been good, and therefore the disturbance was an injury to the plaintiff, and also to the presentee who had an interest by the presentation to him, and being *idonea persona* ought to have been admitted, and upon the refusal of him, a *quare impedit* was brought; and all this before the conviction for recusancy; and for these reasons he prayed judgment for the plaintiff.

If after a *quare impedit*, and judgment for the plaintiff, any thing happens, that the bishop cannot admit the clerk, he may make a special return of that matter upon the writ directed to him.

And upon this record the plaintiff in the present case can make no other presentation, for by her replication she shews that she has presented such a person, and upon the refusal of him, this action appears to have been commenced, and therefore if the plaintiff recovers, the writ shall be confined to the same person.

To this it was observed by Serjeant CHESHIRE, that in *quare impedit* if the plaintiff be outlawed pending the writ, that outlawry gives the King the title, and the plaintiff [179] cannot recover if that appears. Cro. Eliz. 44. Sav. 89.

Which case was allowed to be so, but that it imported no more than that an avoidance (though only a chose in action) was forfeited to the King by his prerogative upon an outlawry; and therefore if tenant to the King has an advowson which becomes void, and the tenant dies, his heir within age and in ward of the King, the King shall present by his prerogative, and not the executor of the tenant, as it would be if the heir was in ward to any common person. and therefore a case of prerogative ought not to be compared to the case of a common person.

But on reversing the outlawry, he shall have execution of his judgment, and the king's incumbent shall be removed. Cro. Eliz. 45, 119, 790.

And 790.

De Term. S. Trin. 8 Annæ.

Moo. 270. And Serjeant CHESHIRE on the other side insisted, that
 1 And. 179. the exceptions to pleading the conviction could not avail,
 7 Co. 28. for it is expressly said that information was given to *R. Buck-*
 Cro. Jac. *nel* and *R. Dyet*, *just^p ad pacem*, which notice was left at the
 54 216. mansion-house of the plaintiff, but the preposition is false,
 2 Bl. Com. if they were not then justices of the peace, and if it was
 277. not then the mansion-house of the plaintiff.
 4 Bac. Abr.
 410.

Secondly, This case is not to be compared to pleading upon a forfeiture or breach of covenant, when the party, who would take advantage of such forfeiture or breach of covenant, must shew precisely that he has done every thing on his part, and therefore he agreed that the pleadings should be as were mentioned, where a man takes the advantage of non-payment of rent, or the not levying a fine, &c. But the justices here have a special authority by act of parliament, and when it is shewn that they have proceeded in all respects as the words of the act direct, it shall be intended that they have done all that those words import or require them to do.

Thirdly, He insisted, that by the act, after summons to the party to appear, &c. he ought to appear before the same justices and no other.

[180]

As to the matter of law he insisted, that by the express words of the statute 1 W. & M. — that every person convicted for recusancy is disabled from presenting; and though in the second clause, which gives the presentation to the university, the words are *from and after such record made*, &c, yet it is manifest that in all cases where the patron is disabled from presenting for recusancy, the university has the presentation, and therefore such a construction ought to be made as may reconcile both clauses of the act, and answer the intent of it.

The conviction, though after the *quare impedit* commenced, may be pleaded in bar, and compared it to cases where matter subsequent, and which happens pending the writ, may be pleaded in abatement to the writ; and cited many cases to that purpose, and relied on the case in Cro. Eliz. where in *quare impedit* outlawry of the plaintiff gives title to the king; he denied that the plaintiff could not revoke her presentation, or that it is confined to this particular presentee, if she recover, or that the presentee of the plaintiff had any right or interest vested in him by this presentation. *Adjournatur. Vide postea* 181.

Hammond

DE^FBT upon a bond, where the condition was, that the defendant shall keep harmless the plaintiff from all jointures, dowers, annuities, damages, claims and all other incumbrances, and shall perform the covenant in the indenture 2 May 1702, whereby the defendant conveys to the plaintiff and his heirs a messuage and lands, called *Little Brinsby* in the county of *Suffex*; and by the same deed the defendant covenanted, that the plaintiff should have, use, possess and enjoy the premises aforesaid quietly and peaceably without any impediment from the defendant, his heirs, or assigns, or any other person, and that clearly acquitted and exonerated of and from all former and other grants, &c. rents, rent-charges, arrears of rent, statutes, &c. charges and incumbrances whatsoever.

What shall be adjudged a good breach of covenant.

[181]

The plaintiff assigns for breach, that the tenements aforesaid were charged and chargeable with one annual rent, viz. a rent of 11s. 6d. to be paid to the lord of the manor of W. in the said county, of whom the said tenements then and before were and are held under the said rent and other services.

The defendant by his rejoinder says that the rent of 11s. 6d. aforesaid was payable to the lord of that manor as a quit-rent, incident to the tenure of those lands, and that the plaintiff was not molested, &c. for any arrears of that rent payable before the making of the indentures aforesaid.

The plaintiff maintained his replication, and the defendant his rejoinder; and upon this there was a demurrer; and the question was, If this covenant was broke?

And resolved by the whole Court without any difficulty, that it was. For the defendant had expressly covenanted with the plaintiff upon his purchase, that he should have the lands discharged of all rents, and therefore they ought to be discharged of this rent as well as of others, for a quit-rent is a rent.

Judgment for the plaintiff.

Case 114 Fitzherbert *versus* Chancellor and Scholars of the University of Oxford and Reeves. In C. B.

Vide ante
169.

THIS case came now for judgment, and TREVOR C. J. delivered the opinion of the Court, and he considered,

First, If the statute 3 Jac. 1. cap. 5. extends to avoidances before conviction, or only to avoidances before conviction for recusancy.

Secondly, If it extends to avoidances after conviction in this case, where upon the avoidance a presentation was made, and for not admitting the clerk presented, *quare impedit* was brought before conviction.

Thirdly, If the conviction in this case was legal?

[182]

And the Court thought that the statute 3 Jac. 1. cap. 5. extends to all avoidances as well before as after conviction; for the words of the act are general, and the subsequent words *when it shall be void*, &c. are words of enlargement and extend the gift of the avoidance of recusants to the university, *toties quoties* the advowson becomes void, and words which were intended to enlarge shall never be construed to restrain the former words. Avoidances before conviction are also within the same mischief as the avoidances after, and it would be a hard construction, that general words shall not be extended to remedy all cases which are within equal mischief.

Secondly, All avoidances being within the statute 3 Jac. 1. cap. 5, though the patron had presented, and upon refusal of his presentee had brought a *quare impedit* before conviction, yet in such case judgment shall be for the defendant; for after the presentation the right remains in the patron; and as before induction the king may revoke his presentation, so a common person, till his presentee is instituted, may at least vary his presentation, and upon such variation the bishop may admit the first presentee or the last; this power then to vary the presentation remains in the patron till the church be full. But by this presentation, nor by the *quare impedit* is the church full, for *quare impedit* would not lie if the church was full by his own presentation. At the time then of the conviction this power or right of varying his presentation remained in the patron, and why shall it not be given to the university after the conviction? This power, if the patron dies, shall go to his executor

De Term. S. Trin. 8 Annæ.

executor or administrator, if he be outlawed, shall be forfeited to the King, Sav. 82. and for the same reason shall be transferred to the university; that when the Chancellor and Scholars of the University after the conviction present an incumbent to the bishop, and the patron before conviction had presented another, the bishop has the election to take one presentee or the other, and therefore when the bishop admits and institutes the presentee of the university, the patron shall not maintain a *quare impedit*, for that there was no disturbance; for it was in the bishop's power to accept if he would: But if the bishop had admitted the presentee of the patron, and the university has brought a *quare impedit*, if that would be maintainable would be another consideration.

[183]

As to what was insisted, that the plaintiff here had a right to maintain *quare impedit* for damages: damages in *quare impedit* are but accessary, and follow the right of presentation; and therefore if the plaintiff had no right to present, she shall not have damages, for her right was not disturbed.

Thirdly, the conviction here is legal; for when the party was summoned before the justices of the peace to take the oaths, &c. the party ought to attend at the day; and here it is alledged, that she refused, and did not come before the justices, &c. It is true, that the justices ought to be present at the time appointed, and if they are not there, it would be a good excuse for the party; and upon rejoinder *quod non recusavit*, if the fact appeared to be so, the issue would be with him, and the party if he pleased might plead specially, that he attended at the time, but the justices were not present, &c.

And in such case the justices are not obliged to do the first act, for there is no necessity that the justices should be present if the party does not come; but is sufficient if they leave one at the place to give them notice if the party comes; and the party himself is obliged to do the first act, viz. to attend at the time and place appointed. Therefore judgment for the defendant.

Shelf and Bailey. In C. B.

Case 115

DEBT upon bond; the condition recites, that a replevin was depending between the defendant and one Webb, who made consuance as bailiff to the plaintiff, for rent due on a demise from the said Isaac Shelf, and Margaret

When one undertakes to submit to an award, for another, ret

where it
shall be ad-
judged
good or not.

[184]

ret his wife ; and then goes on, that the plaintiff *Shelf* and defendant *Bailey* shall stand to the award of arbitrators, *ita quod* the award be made *de præmissis* by such a day.

The defendant demands Oyer, and pleads no award made.

The plaintiff shews the award, which recites, That *Bailey* had brought a replevin for taking his cattle against *Webb* ; to which the defendant *Webb* had made consufance as bailiff to *Isaac Shelf* and *Margaret* his wife, and sets forth, that A. being seised of the place where, in fee, devised the same to *Margaret* his wife, who demised the premises to B. for seven years, and after married the plaintiff *Shelf*, and for rent arrears the avowant as bailiff to *Shelf* and his wife took the cattle levant and couchant in the place where *nomina distriction* ; to which plaintiff had replied, that B. and all those whose estate he hath in the place were, used to repair the fences between the place where, and *Bailey's* close adjoining, & *pro defectu reparation* inde the said bailiff's cattle escaped to the place where ; and issue was joined on the right to repair ; and it was recited, that it appeared to the arbitrators, that B. and those whose estate he hath, ought not to repair the said fences, but a stranger ought to repair them, and then awards, *de & super præmissis* and all matters in difference between the said parties, that all proceedings in the said replevin shall cease ; that *Baily* shall pay 7l. 10s. for the rent arrear to *Shelf*, and 10l. for costs, and *Shelf* shall give him a general release.

Upon this there was a demurrer.

And now it was argued that the award was void ; for that *Webb* was a stranger to the submission, and that by this award the action between *Baily* and him was to cease ; that so much was to be paid to *Shelf*, and he was to give a release, whereas *Webb* is intitled to costs if the plaintiff does not proceed ; and the release of *Shelf* does not discharge the plaintiff *Webb*, being a stranger to the submission, and the award being void as to him.

To which it was answered, that *Shelf* here was the party concerned in interest, and a person may submit to an award for another.

And the Court inclined, that if a person submits to an award on the part and behalf of a stranger, that his bond shall be forfeit if the stranger does not do what the award requires him to do ; but here it does not appear that *Shelf* undertook for *Webb*, or submitted on the part or behalf of him.

DE.

Mo. 3, 559.

10 Co. 131.

3 Leon. 62.

1 Roll. abr.

248.

Hard 46.

1 Leon. 316.

Term. Sanct. Mich.

8 Annæ. In C. B.

The Viscountess Bodmyn, *versus* Sir Richard Case 116
Child.

SCIRE FACIAS reciting, *Cum Sara Vicecomitissa Dotissa* Tenant in
de Bodmyn, quæ fuit uxor Roberti Roberts Ar', Vicecomit' dower shall
de Bodmyn, Trin. 1 Jac. 2. recuperasset versus Abr', Vanden- not have
bendy & Johan' Rotheram' sei am de tertia parte sext' part' execution
several honours, manors, &c. in com' Essex, in reman' post of a rever-
termin' 99 Annor' incipien' 1 Maii 28 Car. 2. limited to sion after a
Geo. Mountague, Francis Butler, and Gul' Jessop, ut dotem suam, terra.
cumque præd' Abr. & Johan' sunt mortui, & Ric' Child, Bar'
in sext' part' præd', unde dos præd' recup'at' fuit, ingressus est
prout ex insinuacon', &c. Præcipe Vicecomit' com' Essex' quod
per probos, &c. Scire fac' præsat' Ric' Child & omnib' tenen'
sext' part' præd' quod essent hic quinden' paschæ ostend' &c.
quare præd' Vicecomitissa execution' & ser'am suam de tertia
parte præd' (ita tamen quod occupator' & possessor' præd' termi-
ni annor' d. & in eadem tertiâ parte adhuc ventur' a possession'
sui inde non amoveant') habere non debet juxta formam recupe-
ration' præd'.

Sir Richard Child appeared, and by his attorney demand-
ed Oyer of the record, & *ei conceditur in hæc verba, Essex,*
ff. Sara Vicecomitissa, &c. by which it appeared, that she
demanded dower against the defendants; who pleaded,
that before the marriage of the demandant with her hus-
band, Charles Earl of Warwick was seised of the said ho-
nours, manors, &c. in fee, and being so seised, by lease
and release 26 and 27 Aug. 14 Car. 2. conveyed the said
estate to the use of himself for life, then to Charles Lord
Rich, his son and heir apparent, for life; then to trustees,
till his first heir on the body of Annie his wife should attain
the age of twenty-one; then to the first, second and other
issue male of the said marriage in tail male successively;
then to the first and other issue male of the said Charles
Lord

[186]

De Term. S Mich. 8 Annæ.

Lord Rich by any other wife in tail; then to the heirs male of the said Charles Lord Warwick, and for default of such issue to the said George Montague, Francis Butler, and William Jessop, for 99 years; then to Hatton Rich for 100 years if he so long lived; then to trustees to preserve contingent uses, then to the first and other sons of the said Hatton Rich, in tail male; then to the heirs females of the body of Charles Earl of Warwick and Charles Lord Rich, equally in tail; then as to one sixth part of the said estate, to the use of the said Robert Roberts and his heirs.

That the said Charles Earl of Warwick, Charles Lord Rich, and Hatton Rich, died without issue, viz. May 23 Car. 2. by which means the said George Montague, Francis Butler and William Jessop, devener' possessionat' of the said term for 99 years, the remainder as to the said sixth part to the said Robert Roberts and his heirs, and his estate in the said remainder. The defendants then aver, quod predict' termin' 99 annorum nondum fuit finit' sive determinat' quodque ipsi nihil habent nec unquam habuer' in præd' sextaparte, &c. nisi in remanere post præd' term' 99 annor' inde; & hoc, &c.

Et præd' Vicecomitissa pet' judicium & sei' am de remanere ill' sibi adjudicari, &c. ideo confid' est quod præd' Vicecomitissa recuperet sei' am suam versus præfat' Abr' & Johan' Rothe-ram de tertia parte remanere præd'.

After Oyer Sir Richard Child pet' judiciu' de præd' brevi de Scire facias pro eo, quod præd' Sara per breve ill' pet' execution' & sei' am de præd' tertiâ parte, &c. ante determinationem præd' termini annor' tam in recordo judicii quam in præd' brevi de scire facias mentionet' ac pro eo quod non apparet quod præd' termin' ullo modo determinat' exist', ac pro eo quod præd' Sara per breve præd' execution' & sei' am al' quam per judiciu' præd' ei adjudicat' fuit.

Et præd' comitissa, pro eo quod præd' Ric. Child tant' pet' judiciu' de brevi de scire facias, &c. al'que aliqua causa rationabilli &c. ac pro eo quod Ric. nihil in præc'usson' execution' & sei' æ ipsius comitissæ, &c. dic', ita quod eadem comitissa remanet versus eum inde quodammodo indefens', ipsa ut prius pet' execution' &c.

To this the tertendants demurred, and shewed for cause, quod præfat' comitissa per replication' suam pet' execution' & sei' am, suam, &c. et non respondet ad placitum ipsius Ricardi in cassation' brevis præd' ut præfert' placitat'.

And

De Term. S. Mich. 8 Annæ.

And it was argued that the plea in abatement was good, for the *scire facias* is a judicial writ, founded upon the judgment, and ought to pursue it, but the judgment is only that the demandant recover seisin of the third part of a remainder after a term for 99 years, but, the *scire facias* prays an execution and seisin immediately, without shewing that the term for years is determined; nay it rather shews that the term is subsisting, for it says that it commenced 1 May 28 Car. 2. and therefore it cannot be determined by the effluxion of time, and consequently shall be presumed to have a continuance if the contrary does not appear; and then during the continuance of the demandant cannot have seisin. And though the writ has a clause (*ita quod possessor sine occupator termin' non amoveant'*) this will not aid it, for it is a contradiction, since the demandant cannot have seisin of the lands without ousting of the termor, for seisin imports the possession, and livery of seisin cannot be made when a term is in possession. If a man grants an estate to A. for years, remainder to B. for life, and A. enters before livery, it cannot be made afterwards, because the termor has the possession, and before A. entered, it could not be made to B. in remainder, for the possession did not belong to him, but it must be made to the termor himself. This shews that the sheriff upon a *hab. fac. sei' am* cannot deliver possession to the demandant without ousting the termors, and therefore this clause is repugnant and contradictory.

Co. Lit.
153, 2.

[188]
Co. Lit.
48, b. 39.
b.

If there be a *scire facias* for the execution of a fine *sur Grant & Render* by him in remainder, after an estate for life or in tail, it must say, that the tenant for life is dead, or that the tenant in tail is dead without issue; so are all the precedents. Off. Bre. 268, 276. Reg. Jud. 12 b. 1 Brownl. Ent. 328.

And if it was not made so, it might be pleaded in abatement. 40 Ed. 3. 16. b. 44 Edw. 3. 39. b.

Serjeant PRATT answered, and the Court thought, that the demandant in dower should have judgment of the reversion and rent, and then she ought to have execution of that judgment, according to Co. Lit. 32. where it is said, that the sheriff shall give execution of a reversion by metes and bounds and of a third part of the rent, and execution shall not stay during the term. And so it was agreed 1 Roll 678. L. 20. Cro. Eliz. 564. *Wheatly* versus *Best*, it was resolved accordingly, and there it is said that the execution shall

Co. Lit. 32,
a
Pigot on
Recov. 162.

shall be special, that the sheriff shall not oust the termor, and though it was urged that there is a distinction where rent is reserved upon the term and where not; for in the first case the sheriff might give possession of the rent in the same manner as where dower is demanded of a rent, of which the wife is dowable; but where no rent is reserved, as in the present case, execution shall be stayed during the term, as was agreed. 1 Roll. 678. L. 22. for then the execution would be of no effect; yet there does not seem to be any difference, for the judgment ought to be executed in the one case as well as the other, and the termor can have no prejudice; and the Chief Justice thought that if the clause (*ita quod possessor, &c.*) had been omitted, the writ would have been good, for the clause is only an expression of that which would have been understood.

[189] It was then insisted that here was a discontinuance, for the plea *pet' judicii' de brevi*, and the demandant by her replication *pet' judiciu' & seisinam*, whereas she ought to have prayed that the tenant *respondeat ouster*, for if the plea was bad she might have demurred to it; if she does not demur, she ought to reply to the matter of the plea, and conclude with praying that the tenant might answer, not with praying seisin and execution; for tenant might plead other matter in bar of the execution, as a release, &c. and therefore ought not to be precluded such matter; and therefore where a defendant pleaded in abatement, and the plaintiff by his replication concluded with praying judgment and damages, it was adjudged to be a discontinuance. H. 1 W. & M. B. rot. 217. Between *Bliss* and *Hardcourt*, Show. 155. 3 Mod. 281. *Sed non allocatur*; for the plea in abatement is in nature of a demurrer, it being on matter appearing in the writ, not on any fact *dehors*, and when the tenant has made the first default, the demandant may well pray execution and seisin.

But it was adjourned, and afterwards judgment was given by the whole Court, That the plaintiff should not have execution upon this *scire facias*, there being no rent reserved upon the term, and therefore it would be vain for the plaintiff to have execution before the term was ended.

Judgment for the defendant.

Term. Sanct. Hill.

8 Annæ. In C. B.

Bird and Line.

Case 117

ACTION upon the case, in which the plaintiff declares, *Quod prædict' defend' malitiose machinans & intendens ipsam Eliz' (plaintiff) minus rite prægravare, opprimere, imprisonare & depauperare, ex malitia sua præhabuit 16 die Junii anno Annæ Reg' 8. levavit quandam querel' in cur' palatii apud Westm' versus ipsam Eliz', & querel' ill' in cur' prædict' prosecut' fuit sine aliqua causâ rationabili, donec prædict' quer' virtute cujusdam brevis de cap' extra eandem cur' ad secl' ipsius def' 21 Junii prædict' capt' ac arrestat' fuit, & in prisonâ ejusdem cur' pro defectu manucapt' detent' & imprisonat' fuit per spanium 30 dier', ipse prædict' def' bene sciens seipsum nullam legitim' causam action' versus quere habere.*

Action of the case does not lie for a malicious suit pendente lite.

Defendant demurred generally.

I insisted for the defendant, that this action does not lie; for though an action on the case lies against one who sues in an improper court, where there is no jurisdiction of the cause, knowing it, *Lut. 1571.* and against one who sues in a proper court, but proceeds there vexatiously; as by taking out a *feri fac'* knowing that a *feri fac'* had been executed before; so where one sues out irregular process, or pursues legal process for an illegal purpose; or where process is issued so clandestinely that the defendant had no notice of it till he was outlawed; or where so great damages are alleged, that the defendant cannot put in bail; yet where a man brings an action, and proceeds regularly in a course of justice, though the suit be without cause, yet an action on the case will not lie; for if the plaintiff does not recover, he shall pay costs. And this was agreed by all the judges of England, 2 R. 3. 9. h. No man shall be punished for suing out the king's writ, be it of right or wrong. *F. N. B. 429.* And the same rule is agreed *Co. Lit. 161. a.* And the same thing was resolved by all the judges. *Cro. Eliz. 794.* And it

*Hob. 205.
3 Lev. 310.*

[191]

No man
shall be pu-
nished for
suing out
the king's
writ.

3 Term.

Rep. 51.

Hob. 206,

266.

Noy 23, 37.

1 Roll. abr.

34, 102.

H. b. 205,

267.

Cro. Jac.

134.

1 Mod 4.

1 Sid. 3.

3 Lev. 210.

1 Com.

D. g. 170.

Co. Lit.

161, 2.

Harg. note

4.

Doc. Plac.

56.

Lane 62,

4 Co. 18,

b.

it was so resolved by the whole court in an action upon the case for suing for tithes in the spiritual Court after payment to the party himself. Cro. Eliz. 836. 1 Roll. Ab. 102. Noy 37. And so it was resolved by the whole court in an action upon the case for suing in the spiritual Court for tithes of gross trees. 2 Cro. 133. 1 Rol. Ab. 34. And to this HALE agreed. Hard. 169.

And in these cases, where it is resolved, that an action upon the case lies where there is any collusion in the proceedings or abuse of the process, it is generally agreed, that if a suit be brought without any cause, where there is no other ingredient or circumstance in the case, an action upon the case does not lie for that.

And I apprehend it cannot be contended, that an action upon the case will lie where the plaintiff declares, that the defendant commenced an action against him without any reasonable cause, and upon which the defendant in the first cause was by the process of the court arrested, and carried to prison for want of bail, without saying any more; for the same declaration might be upon every suit in Westminster-hall.

And therefore if the other words, *malitiose machinans ipsam opprimere, &c.* or *sciens seipsum legitim' causam action' non habere*, do not alter the case, the action here does not lie. But as to the first words, *malitiose machinans & ex malita præhabita, &c.* which are added of course, they cannot render the action maintainable if the fact alleged in the declaration be not in its own nature, or has a tendency towards being illegal, covenous or oppressive. Vide 1 Rol. Abr. 111. So the words *Sciens seipsum non habere legitim' causam action'* cannot render the action maintainable; and upon this I would offer this distinction: Where the fact alleged in the declaration appears to have a tendency to vexation or oppression, there the allegation, that the defendant knew the fact, may make the action maintainable, which otherwise would not lie; for there the fact is proveable and triable, and that notice of this was given to the party may be well proved; and therefore if there be an action in an inferior court for a cause of action arising out of the jurisdiction, there the allegation, that the party was *sciens* of that, may make the action maintainable; for there the limits of the jurisdiction is matter of fact, and also the notice which the party had, that the action arose out of those

those limits, is a fact which may be well proved and tried; so perhaps if a declaration alledges, that the defendant brought his action for such a sum *sciens* that it was paid, or brought his action upon a bond *sciens* it was forged, the action may be maintained; for the *sciens* is alledged of a fact which may be well proved. But where the *sciens* goes to a thing which lies solely in the mouth of the party, as in the present case, if the action is not otherwise maintainable, the *sciens* will not maintain it; for if the *sciens* renders the action maintainable, it ought to be traversable, and capable of proof and trial. But how shall it be proved that the party knew he had no legal cause of action? If he was so informed, perhaps that information did not persuade him; if he himself declared so, perhaps he was afterwards convinced to the contrary: This is a thing secret in his own mouth only, which cannot be proved; then how shall it be tried? Can a jury determine what shall be a legal cause of action? *Ad quæstionem facti respondent jurator, ad quæstionem juris respondent iudices.*

This is not like to an action upon the case in the nature of a conspiracy for an indictment *absque probabili causa*; for there the indictment is matter of fact, and the matter for which the party was indicted is a fact which shall be tried by a jury if he was guilty or not; and therefore the jury may well try if there was a probable cause for such indictment or not. But if the action in this case should lie, the plaintiff does not shew that the action in the inferior court was determined; perhaps it is not yet determined that judgment there shall be for the plaintiff.

[193]

Serjeant PARKER *contra* argued, that the cases cited only prove, that an action upon the case does not lie for suing in a course of justice; but if a man, who knew that he had no cause of action, commences a suit in an inferior court, where bail cannot be taken, and declares that this was for vexation, and to detain him in prison without bail, when there never were any dealings between them, *as the case now is to be understood*, will not an action then lie? And this may be well proved; for it is admitted, that if an action be commenced for money which is paid, or on a bond which is known to be forged, an action on the case will lie; and why cannot it be proved that an action was commenced for vexation, and with an intent to imprison, as well as that it was commenced after the payment of the money, &c.? In the case 3 Lev. 310. it was agreed for

De Term. S. Hill. 8 Annæ.

H. b. 267. the plaintiff, that an action lies for a vexatious suit; and LEVINS only doubted, because it was not alledged *quod fuit sciens* that he had no cause of action; and HOBART expressly says, if a man sue in a proper court, yet if his suit be without any ground of truth, and that certainly known to himself, the plaintiff may have his action on the case for it, tho' the suit in itself be legal

TREVOR C. J. inclined to think that an action on the case would lie; for the declaration says, that *fuit absque rationabili causa*, as well as that the defendant *fuit sciens* that there was no cause of action.

BLENCOE J. observed, that it was 'not alledged here, that the cause in the inferior court was determined. To which the Chief Justice and the whole Court agreed, and for that reason were of opinion against the plaintiff, but did not give any express opinion that the other matter would be for the plaintiff; and therefore the plaintiff was permitted to discontinue his action.

[194]

Case 118

A devise to one for life, and then to be at her disposal, provided she disposed of the same after her death to any of her children; held only an estate for life in the mother.

1 Salk. 239.

10 Mod. 31.

2 Eq. cal.

abr. 309,

pl. 13.

Dighton and Tomlinson. In C. B.

EJECTMENT upon the demise of — upon not guilty pleaded, at the trial at York assizes, the jury found a special verdict to this effect: viz. That *John Tomlinson* being seised in fee, by his will dated 19 Feb. 1668. devises to his wife *Margaret* all the rest of his freehold lands and tenements in *York* for life, and then to be at her disposal; provided that she dispose of the same after her death to any of her children, &c. After the testator's death the wife having issue a son and a daughter married again, and she and her husband by lease and release conveyed the lands to the use of herself for life without impeachment of waste, after her death to her daughter in tail, and for want of such issue, to her son and his heirs, with a power of revocation; and if, &c.

Serjeant PRATT argued for the plaintiff, who claimed under the daughter, and insisted,

First, That by this devise *Margaret* had a fee; and it is not material whether it was upon a trust, or upon condition; I agree, if a man devises, that J. S. shall dispose of his lands, nothing passes but a power, and no estate; but if lands are devised to one upon an intent or condition, which cannot

cannot be performed without an estate of inheritance in the devisee, there the devisee has a fee; as if there be a devise to any person to sell, here then, if the devisor had given his lands to *Margaret* his wife to be at her disposal, without mentioning the words *for life*, she would have had a fee. The statute of wills says only, that a man may dispose at his will and pleasure; and there never was any doubt but that he might by this expression give a fee. If a man devise to another and his assigns, it will be a fee. A man devises for life, and after to be at the discretion of his father; and held to be a fee. 1 Leon. 283. *Genner and Hardy*. A man devises to *Edith* his wife for life, and after for her disposal; held that the wife had a fee; which is the same case as here; and the case Dal. 56, is stronger. It is true, if a man devise to A. for life, and after that he dispose to any particular person, there may be a doubt if this be not tantamount to a devise to such particular person; but here the power of disposition is general both as to person and estate.

The case 1 Mod. R. 189. *Saltenstall* versus *Lith* is nothing to our case; but as it is reported Carter 232, makes for us.

If then the words (for life) had been omitted, the devise would have been in fee; but the addition of the words does not alter the case.

But if she had but an estate for life, with a power of disposing, she has well executed that power. The law does not require any precise conveyance for the execution of a power, a bare appointment is sufficient. 1 Mod. 189. *Lith* and *Saltenstall*. Litt. Sect. 169. Executors may sell, though they have not the estate. *Covenant to stand seised*, 1 Lev. *Lease and Release*, 1 Lev. 150.

But it may be objected, that here the lease and release must operate as a conveyance, and afterwards as an appointment. 1 Roll. 329. 2 Pl. 10. *Dige* ver. *Lith*; it may be so.

But it was objected, that the appointment ought to be by devise, and not to any person who would perhaps then not be *in esse*: But certainly such construction should be made as may be agreeable to the nature of the case; she could not make the disposition after her death: and if she did it in her life, why might she not do it by an act executed, as well as by will? It was said, that a will is revocable; but

1 Inst. 9, b.
1 Roll. abr.
832.

A devise of
lands to ex-
ecutors to
sell, is a
fee-simple.

1 Inst. 113.

1 P. Will.

131.

[195]

1 Jon. 137.

Litch. 39,

134.

Noy 80.

Bend. 178.

2 Lev. 104.

1 P. Will.

131.

Carter 232.

Pl H. 7, 20.

1 Inst. 112,

2.

Harg. Co.

Lit. 112. 2.

note 6.

here she has added a clause of revocation, which answers all the purposes of a will.

[196] Then tho' she has limited to herself an estate without impeachment of waste, that is not material; for it is no part of the execution of her power, but an addition to her own estate; and the addition is void if she had but an estate for life; as in the case 1 Roll. Abr. 313. where there is a licence to a copyholder to make a lease; if he leases pursuant to the licence, and adds any other circumstance not warranted by the licence, the addition is void. If an executor assent to a legacy with condition, the assent is good, but the condition void. So if a woman assign her dower with a condition, the assignment is good. Then the husband joining in the execution does not vitiate the execution of the power. 1 Roll. Abr. 369.

If one who has no estate in the land join in a lease with him who has the estate, and is but the confirmation of the other. Co. Lit. 45. a.

It will be no objection, that she has not given a fee but only in tail, for the power to make a greater warrants a lesser estate. 1 Roll's Abr. 330.

Serjeant WYNNE argued for the defendant, who claimed under the son and heir at law.

This case was afterwards argued by Ser^r. CHESHIRE for the plaintiff, and Serjeant PARKER for the defendant; and it was insisted for the defendant, first, that the wife by this devise had only an estate for life with a power to dispose; and secondly, that this power was not well executed.

Upon the first point the court unanimously held that the wife had only an estate for life; but upon the second point three of the judges held the power well executed; so judgment was given for the plaintiff; which was afterwards affirmed upon a writ of error in the Queen's Bench.

[197]
Calc 119

Peate and Ougly. In C. B.

Where a will is well executed within the statute of fraud, &c

IN EJECTMENT upon the demise of *Oliver St. John*, at a trial at Guildhall after term, before Lord Chief Justice TRENOR.

The case upon evidence appeared to be as follows: viz. *Oliver Earl of Bolinbroke* before the statute 29 Car. 2. ca. 3. viz. 1658-9, wrote his will with his own hand on a sheet of paper, and the writing went to the bottom of one side, and

De Term. S. Hill. 8 Annæ.

and half way on the backside, which will at the end of it had the name and seal of the earl subscribed, and notice was taken in his own hand of some interlineations. At a very little distance at the backside of the same paper, a codicil was written which extended almost to the bottom of the same backside of the paper, and was dated 1679, which was after the statute 29 Car. 2. and had the name of the devisor subscribed and his seal affixed; in which codicil a legacy as to a house in *Ludgate-street, &c* was revoked, and the same was thereby devised to Sir *Andrew St. John* for life, and after to his brothers successively, but notice was not taken of the names of his brothers in the codicil, but they were named in the will; at the top of the will was written (*signed, sealed and published as my last will and testament, in the presence of, the same being written here for want of room below;*) this was likewise written by the testator's own hand, and then the names of the three witnesses were subscribed; two of those witnesses were dead, and the third was produced at the trial, who testified that he was servant to the testator *Oliver Earl of Bolinbrooke*, four years, and about 27 or 28 years ago, he and the other two witnesses were called up in the night and sent for into the Earl's chamber, who produced a paper folded up, and desired him and the others to set their hands as witnesses to it, which they all three did in his presence, but they did not see any of the writing, nor did the Earl tell them it was his will, or say what it was, but he believes this to be the paper, because his name is there and the names of the other witnesses, and he never witnessed any other deed or paper for the Earl. And though the Earl did not set his name or seal to the will in their presence, yet he had often seen the Earl write, and believes the whole will and codicil to be of his hand-writing. [198]

Upon this evidence, first, it was insisted for the defendant, that it does not here appear that the codicil was well executed according to the statute, for it is not proved that the codicil was wrote when the witnesses subscribed their names to the will.

Secondly, The execution of the will is not good within the statute 29 Car. 2. c. 2, (and therefore, if the codicil was wrote then, it is good for nothing) for it is not sufficient that the witnesses write their names in the presence of the testator without any thing more, but they must attest every thing, viz. the signing of the testator, or at least the publication

De Term. S. Hill. 8 Annæ.

eration of his will ; but here the testator neither signed the will in their presence, nor declared it to be his last will before them.

Thirdly, If the codicil was well executed within the statute, yet the devise to the brothers successively is void for the uncertainty which shall take first in the succession, as a grant or lease to A. *habendum* to him and two others successively is void, for the uncertainty which shall take.

On the other part it was insisted, that upon this evidence it is apparent that the codicil was wrote before the execution of the will, for otherwise there was no reason that the witnesses should write their names at the top of the first side of the will, and the words wrote by the testator's own hand, as the reason of it, had been false if the codicil had not then been upon that paper, for there would have been sufficient room below the will for the witnesses to attest it. The witness also says that the execution was about 27 or 28 years ago, which time is subsequent to the codicil.

The execution is sufficient within the statute for there is no necessity that the witnesses see the testator write his name, and if he writes these words, *signed, sealed and published* as his will, and prays the witnesses to subscribe their names to that, it will be a sufficient publication of his will, though the witnesses do not hear him declare it to be his will.

[199]

Sir JOHN HOLLIS mentioned a case determined by Lord Chancellor SHAFTESBURY before the statute 29 Car. 2. where a man wrote his will with his own hand, and also these words, *signed and published in the presence of*, and no witnesses had subscribed it, it was held to be a sufficient publication.

TREVOR C. J. inclined that here was sufficient evidence to find the codicil well executed, and the jury found it accordingly.

2 Raym.
1282.

But as to the matter of law, the Chief Justice permitted it to be found, and therefore the jury brought in their verdict as to all except a messuage in *Ludgate-street*, not guilty ; and as to that, that *Oliver Earl of Bolinbrooke* was seised of that in fee, and being so seised by his codicil 1679 devised it *prout, &c.* That *Sir Andrew St. John*, had two brothers *Rowland* and *Oliver* the lessor of the plaintiff ; that *Rowland* died in the life of *Sir Andrew*, and *Sir Andrew* died about two years ago. And after his death *Oliver* entered and demised to the plaintiff. That the defendant claimed

De Term. S. Hill. 8 Annæ.

claimed by purchase for a valuable consideration from *William* now Earl of *Bolinbrooke*, who was heir at law to the testator.

Dr. Pelling and Whiston, before the Delegates. Case 120

DR. PELLING being minded to exhibit articles of heresy against Mr. *Whiston*, who dwelt within the exempt and peculiar jurisdiction of the Dean and Chapter of *St. Paul's*, Dr. *HARWOOD* by letters of request 18 Nov. 1712, requests Dr. *BETTESWORTH*, official of the Arches, to call said Mr. *Whiston* before him, and hear and determine the said cause,

In a libel for heresy, the refusal of a citation by the dean of the arches, held a good cause of appeal to the delegates.

Dr. *BETTESWORTH* by letter dated 19 December 1712, recommended it to him to proceed in this as in other causes of ecclesiastical cognisance, there being no suggestion of any reason why the cause should not be brought before the proper ordinary.

[200]

On the 14th of Feb. 1712, Dr. *HARWOOD* by new letters of request (for it may be doubtful whether he as commissary of the peculiar jurisdiction can proceed to a final hearing, or inflict proper punishment. &c.) appeals his request to Dr. *Bettesworth*, official, &c. to call Mr. *Whiston* before him, and determine the said cause.

Before this, viz. 26 January, Dr. *Pelling* prays a citation from the Court of Arches against Mr. *Whiston* for heresy; Dr. *Bettesworth* takes time to consider of this prayer till the next court.

At the next Court, viz. 4 February, Dr. *Bettesworth* orders his answer to the letter of request of Dr. *Harwood* to be sent to him.

At the Court 16 Feb Dr. *Pelling* prays again a citation, and counsel is heard thereon 25 February, when Dr. *Bettesworth* decrees, that letters of request from Dr. *Harwood* lie not before him, because in a case of heresy the bishop of the diocese hath jurisdiction in places otherwise exempt within his diocese, and notwithstanding the statute of citation an heretick may be cited to appear before him upon letters of request from the Judge of the peculiar, or by process *sub mutuo*, &c. and therefore he cannot decree a citation, &c.

2d March, Dr. *Pelling* appeals to the delegates, upon which the QUEEN appoints a Court of Delegates upon the 1st

De Term. S. Hill. 8 Annæ.

1st of July 1713; the matter came to be heard before the Delegates, and it was insisted on by Dr. PAUL and Sir PETER KING, that a superior Judge is not obliged to accept letters of request, for no law saith that he is so obliged, and it would be inconvenient since the fees would all belong to the inferior Judge, and unreasonable since the superior Judge cannot oblige the inferior to grant such letters of request, and therefore ought not to be obliged to accept them.

[201] Secondly, The inferior Judge in this case had no jurisdiction, for he cannot excommunicate, degrade or deprive. Stat. 2 H. 4. c. 15. speaks of the bishop of the diocese, and so is 10 H. 7. c. 17. Lind.

Thirdly, The bishop of the diocese hath jurisdiction in case of heresy in places exempt.

Fourthly, There was no cause depending before Dr. *Harwood*, and the Arches have jurisdiction only in case of appeals by patent.

But it was answered by Sir NATHANIEL LLOYD, myself, and Dr. HENCHMAN, and so resolved by the Court of Delegates, that the refusal of the citation by Dr. *Bettesworth* was a fault for which this appeal was proper. For,

First, Dr. *Harwood*, the Judge of the exempt jurisdiction in the cause, though he could not inflict the censures of degradation or deprivation.

Secondly, The bishop of the diocese had no jurisdiction in this case; for by 24 H. 8. c. 9. no person shall be cited to appear before any ordinary, archdeacon, commissary, official or other Judge spiritual, out of the diocese or peculiar jurisdiction where the person cited is inhabiting at the time of citation; unless

First, For any spiritual offence omitted or committed by bishop or other spiritual Judge.

Secondly, For cause of appeal.

Thirdly, In case the bishop or other immediate Judge do not or will not convene the party.

Fourthly, Or be party directly or indirectly.

Fifthly, Or in case the bishop, or other inferior Judge by right or commission make request to the bishop, or other superior ordinary, to determine in cases where the canon law or civil law affirm execution of such request to be lawful.

[202] Therefore the bishop by the express words is restrained in all cases, except those five, from citing any to appear before

De Term. S. Hill. 8 Annæ.

before him dwelling in peculiars ; and consequently in case of heresy, as well as any other. Cro. Car. 162. *Cadwalader ver. Brian.*

But by a proviso in this statute every Archbishop may cite any person dwelling in any diocese within his province for cause of heresy, if the bishop or other immediate ordinary consent, or do not his duty in punishing the same ; and this is agreed H. P. C. 5. Haw. P. C.
Leach's
Ed. 6, sect.
5.

It is true, the bishop upon request from an inferior Judge may cite, &c. but such inferior Judge must be subordinate to him: But the dean and chapter of St. *Paul's*, having an exempt jurisdiction, are not subordinate, but in an equal degree with the bishop ; the person exempt, as *Linwood* — expresses it, *vices gerit episcopi* ; and therefore the letters of request from Dr. *Harwood* ought to be to the Archbishop, who is his superior ordinary, and not to the bishop of *London*.

If a man have *bona notabilia* in several peculiars, administration shall be granted by the archbishop, not the bishop. *Per Twisden and Windham, 1 Lev. 78.*

A suit in the Arches against any in the diocese of *London* is good ; for there was an ancient composition between the bishop and archbishop, which amounts to a general licence. Cro. Car. 339. Ray. 91.

And when a suit is in the archdeacon's court, request shall be made to the bishop, for the power of archdeacon was derived from him, and not to the archbishop *per saltum*. Hob. 16, 186.

So where a peculiar is subordinate to the bishop, as it may be, M. 14 Car. 2. *Tull ver. Osberson.* [203]

Since then the Arches, which is the court of the archbishop, is the superior ordinary, to whom the cause ought to be transmitted from the peculiar of the dean and chapter of St. *Paul's*, the judge of the Arches by refusing a citation, &c. denied justice.

Whereupon the Delegates reversed the sentence, and ordered a citation for Mr. *Whiston* to appear before them, which was served ; and Mr. *Whiston* put in an allegation to the jurisdiction, that the delegates are not *judices competentes*, being impowered by their commission only to hear and determine a cause of appeal between Dr. *Pelling*, and Dr. *Bettesworth*, to which Mr. *Whiston* was no party ; and that they had no original or ordinary jurisdiction by their commission, &c.

Termino Pasch.

10 Annæ. In B. R.

Case 121

Parflow and Cripps.

Where corn
taken in ex-
ecution
may be dis-
trained.

ACTION upon the case, for rescuing a distress taken for rent, contrary to the statute 2 W. & M. sess. 1. ca. 5. Upon a special verdict, the case appeared to be this: Tenant at will had a judgment and execution against him by *fieri facias*, and upon the *fieri facias* the sheriff seized the corn growing on the land, and sold it to the defendant, and after the return of the *fieri facias* was passed, the defendant severed the corn from the land; and during the time the corn lay upon the land in ricks and swarfs, the plaintiff being lessor of the land, distrained the corn lying on the land for rent arrear; then the defendant took and carried away the corn, upon which the plaintiff brought this action against him upon the statute W. & M. for a rescue. And if this taking was a rescue, the jury found for the plaintiff, otherwise for the defendant.

It was argued for the plaintiff, that by this statute corn is made distrainable upon the land, and therefore this distress is warranted by the express words of the statute. But before this statute, corn could not be taken in execution by the sheriff upon a *fieri facias*, if it was not severed before the return of the writ, for the corn till severance is parcel of the land, and goes with the land in all cases, except where the tenant has an uncertain interest, and his interest determines by the act of God or of the lessor, or otherwise without his default. If lessee at will determines his will himself, he shall not have the emblements, but his lessor shall have them. Co. Litt. — And therefore, if after execution and sale by the sheriff in this case the lessee had determined his will himself, the lessor would have had the emblements; and it would be inconvenient if the sheriff upon an execution should sell goods in which the party had no property; for perhaps the property might be in the lessor: The corn like-
wise

De Term. Pasch. 10 Annæ.

wife at the time of the sale was not in the same plight as at the time of the severance, for it received nourishment and increase afterwards from the land; and if the sheriff should be allowed to sell upon an execution immediately after the sowing, he would sell goods which were not then in the possession of the defendant, against whom the execution was, but which afterwards received their nourishment and value from the lands of another: But if the sheriff may sell the corn upon a *feri facias*, yet the vendee shall not be in a better condition than a grantee of the tenant or stranger; and therefore if the vendee permits the emblements after severance to lie on the ground, they are distrainable for the rent of the land, as well as they would be after the sale of them by the lessee himself, or as the goods of a stranger, if found upon the land, may be distrained,

Fyson and ——. In C. B.

Case 122

INDEBITAT' ASSUMP'. Defendant pleads, that since the 1 June 1705. *Et ante impetr' orig'* he became a bankrupt within the several statutes concerning bankrupts, *quod- Bankruptcy how it should be pleaded.* *que causa action' accrevit* before the defendant was a bankrupt, *Et de hoc pon' se sup' patriam.*

Upon this plaintiff demurred, and shewed for cause,

First, That it did not appear when the cause of action arose.

Secondly, That the plea concluded to the country, whereas it ought to have been with an averment.

But without any regard to these reasons the Court held [206] the plea bad; because it did not shew the defendant was intitled to this plea within the statute 4 & 5 Annæ, c. 17. for the plea is bad at common law, and when a statute allows such a plea, the defendant must shew that he pleads it *vi-gore stat.* and it is not like the cases where a statute gives liberty to plead the general issue and to give the special matter in evidence; for here the statute does not give any authority to plead the general issue, but to plead generally in such manner, add therefore he must shew that he pleads in such manner by virtue of the statute.

Chambers

De Term. Pasch. 10 Annæ.

Case 123

Chambers and Shaw. In C. B.

If an executor pleads bonds and judgments, and no assets *ultra* the judgments, and the plaintiff replies that the bonds were fraudulent, and it is found against him, he cannot have judgment, though the assets are found to be *ultra* the judgment pleaded.

IN an action against an executor, who pleads several bonds due from the testator, and several judgments against himself as an executor, and that he had not assets *ultra* what was subject to the judgments recovered, the plaintiff replies, as to the bonds, that they were obtained by fraud, and the defendant had assets *ultra* the judgments; and upon this issue joined; and upon the first issue the jury found for the defendant; and upon the other for the plaintiff; and it was now moved that the plaintiff might have judgment.

But *per cur'* he cannot; for though the issue is found that the defendant had assets *ultra* the judgments, yet when it is found for the defendant upon the other issue, then it appears that the bonds were given for true debts, and the plaintiff cannot recover if there are not assets more than will satisfy those bonds as well as the judgments.

[207]

Case 124 Thornby and Fleetwood. Int. Trin. 9 Annæ, Rot. 1842. In C. B.

A recovery suffered by a person bred a papist, and instructed in a seminary or college of jesuits beyond sea in the popish religion, held good, notwithstanding the stat. 1 Jac. 1 c. 4 & 6, 3 Jac. 1. c. 5. and the 3 Car. 1. c. 2.

EJECTMENT upon the demise of the Duke and Duchess of *Hamilton*; and upon a trial at bar in the Common Pleas, there was a special verdict to this effect.

Thomas Lord Gerrard ob' 1617. had issue,

Gilbert ob' 1623,

who had issue

Dutton, ob' 1640, and *Alice* married to

who had

Charles, ob' 1667,

who had

Digby, ob' 1684,

who had

Elizabeth, Duchess of Hamilton.

Roger Owen,

who had

Thomas Owen,

who had

Roger Owen now living.

John, ob' 1673,

who had

Richard, ob' 1679,

who had four sons, viz.

Charles, William,

Philip, Joseph, and

one daughter

Frances, married to defendant.

Charles, William and *Joseph* died without issue.

Philip is now living.

Charles

De Term. Pasch. 10 Annæ.

Charles Lord Gerrard was seised in fee of the lands in question, and by settlement the 28th and 29th of November 12 Car. 2. on his marriage with *Jane Digby*, settled them to the use of himself for life, remainder to his wife for life, then to the first and other sons of that marriage in tail male, remainder to himself and the heirs of his body; remainder to the heirs male of the body of *Thomas Lord Gerrard* his great grand-father, remainder to his own right heirs.

That *Charles Lord Gerrard* died leaving *Digby Lord Gerrard* his son and heir, who died 8 Nov. 1684 without issue male, leaving *Elizabeth* now Duchess of *Hamilton* his only child and heir.

That *John*, the younger son of *Thomas Lord Gerrard*, and *Richard* his heir, died before *Digby Lord Gerrard*, and that *Richard* in his life placed his sons *Charles*, *William* and *Philip*, at *St. Omers* beyond the seas, under the obedience of the king of *Spain*, to be educated in the popish religion; that they resided there for five years in a seminary or college of Jesuits, and were instructed in, and there professed the popish religion. That *Charles* returned anno 1681, and after the death of *Digby Lord Gerrard*, entered as heir male of the body of *Thomas Lord Gerrard*, and Pasch. 1 Jac. 2. suffered a common recovery, and by indenture 22 May 1685, declared the uses to himself and his heirs, and afterwards made a settlement on his marriage, and after the death of Lady *Jane* the wife of *Digby Lord Gerrard*, viz. — 1703, suffered another recovery to the use of himself in fee; that *William* and *Joseph* died without issue, and then *Charles* died the 27th of April 1707, having always professed the popish religion, but that *Philip* is now alive and professes the popish religion.

[208]

That *Roger Owen*, who is descended from *Alice*, is his next of kin, being a protestant.

That after the death of *Charles* without issue, the defendant in right of *Frances* his sister entered, upon whom the Duke and Duchess of *Hamilton* entered, and being ousted by the defendant, brought their ejection.

This special verdict came on to be argued Trin. 11 Annæ by Serjeant *HOOPER* for the plaintiff, and by Serjeant *PENGELLY* for the defendant, and the Mich. following by Serjeant *PRATT* for the plaintiff, and Serjeant *SELBY* for the defendant, and the Hillary term following by Sir *THOMAS POWIS* for the plaintiff, and Serjeant *CHESHIRE* for the defendant; and now

TREVOR

De Term. Pasch. 10 Annæ.

TREVOR C. J. delivered the opinion of the Court, who all agreed judgment should be given for the defendant. Upon which a writ of error was brought in the King's Bench upon a judgment given in the Common Pleas for the defendant in this case, East. Term 11 Annæ, and for the better understanding the arguments on the writ of error, I shall give the resolution of the Court of Common Pleas, which was delivered by Ch. J. TREVOR when judgment was given there for the defendant.

[209] And he said that the title of the lessors of the plaintiff was upon the construction of the statute 1 Jac. 1. 4 & 6. 3 Jac. 1. c. 5. and 3 Car. 1. c. 2. for the lessors of the plaintiff cannot have any title to the lands in question, if there is not such a disability by reason of those statutes, as to make the recovery suffered by *Charles Lord Gerrard* void, and the estate tail determined, or at least cease; for the lessors claim in remainder, and if the recovery be good, their remainder is barred; or if the recovery is not good, yet if the estate-tail is not determined, *Philip* is heir in tail, and alive, and may have issue inheritable to the same estate-tail; and then the lessors, who claim by force of a remainder subsequent to such estate-tail, cannot enter.

And he said, that the counsel for the plaintiff had only insisted upon the statute 1 Jac. 1. 4. for the subsequent statutes could not give him any title; and the question upon them was, if they had altered the statute 1 Jac. 1. 4. and therefore the counsel for the plaintiff had argued, that by 1 Jac. c. 4. there was such a disability in *Charles Lord Gerrard* that his recovery was void, and that *Philip* being disabled in the same manner, and no other person being *in esse*, who could take the estate-tail, the lessors of the plaintiff by consequence were intitled as if the estate-tail was actually determined; for it was not insisted on (neither was there any colour for it) that by the latter statutes the lessors of the plaintiff had any title; for the 3 Car. 1. c. 2. gives the forfeiture upon conviction to the king for the life of the convict; and therefore all that was urged by the plaintiff's counsel in respect of those acts was, that by them 1 Jac. 1. c. 4. was not altered, but enforced; and therefore the only matter to be considered is,

First, What would be the operation and effect of the statute 1 Jac. 1. c. 4. if the others had not been made.

Secondly, If 1 Jac. 1. c. 4. be enforced, or repealed, or altered by the subsequent statutes.

As

De Term. Pasch. 10 Annæ.

As to the operation and effect of 1 Jac. 1. c. 4. by which it is enacted, That every person, &c. who shall go or shall send any child, &c. beyond sea, to the intent to enter into any college, seminary, house of jesuits, &c. to be instructed in the Popish religion, &c. the person sending, &c. shall forfeit rool. and the person passing with such intent, &c. shall in respect of himself only, and not of his heirs or posterity, be disabled to inherit, purchase, take, have or enjoy any manors, lands, &c. and that all estates, terms, and other interests hereafter to be made, suffered or done, to or for the use or behoof of such person, &c. shall be void, and any in such seminary, &c. who shall not return in a year and submit, &c. shall in respect of himself, and not of his heirs or posterity, be disabled to inherit, have or enjoy any manors, lands, &c. Provided if any person so sent, sending or being in such seminary, &c. shall after become conformable, &c. he shall be discharged of all such disability.

[210]

Upon this statute it was difficult to tell the effect of this clause, what was the consequence of the disability, and who should have the land of a person disabled during his disability.

The counsel for the plaintiff have insisted, that where the estate descended before the disability incurred, he was only disabled from taking the profits; but where the descent was after the disability incurred, there the disability prevented him from taking the descent. But it would be a hard construction of the same words, to make here a different interpretation, which will not serve all cases upon this act, though it serves the case of the plaintiff in the present question: For if an estate in fee was to descend to a person disabled, if he could not take it by descent, who shall take the lands? His heirs cannot have them, for *non est hæres viventis*, and he cannot claim as heir to him in his life; and therefore by such a construction none can take them at all; and then the person disabled shall have the lands from necessity, for no one can take them from him. If the person disabled shall purchase lands, his heir shall not have them, as his heir, till after his death; and therefore the purchaser must have the lands, for no one can recover them from him.

The disability in this act is not like the disability of a monk, or a man professed, for he is dead in law; but a person

[211] person disabled by this act is not dead in law, nor subject to an absolute incapacity, for he shall enjoy the lands after conformity.

And therefore the natural construction of the words is, That he shall be disabled from taking the profits of the lands; and when this construction is allowed, where the descent was prior to the disability incurred, it will be reasonable that the same words should have the same construction, where the descent is subsequent to the disability.

And this is not only the natural, but also the legal construction of the words; for when the act gives a forfeiture of the profits of the land, and does not say who shall have the forfeiture; this being for a public crime and offence against the government, the law will give the forfeiture to the king: For though for a private wrong the penalty shall sometimes by way of recompence belong to the party grieved, yet for a public offence the law will give the forfeiture to the king, as the head of the public; so it was resolved 2 Vent. 269. So in other cases, if the statute does not say to whom the forfeiture shall belong, it shall of necessity belong to the king; for it cannot belong by implication to one subject more than to another.

So upon the statute 1 Jac. it was uncertain whether the king was intitled to the penalty before conviction. But all those doubts are explained by 3 Car. 2. c. 2. The statute 3 Jac. seems to be intended for another purpose; for by that it was enacted, That if the children of any subject, to prevent good education, or for any other cause, be sent or go beyond sea without licence, &c. they shall take no benefit by gift, conveyance, descent, devise or otherwise of or to any lands, &c. till he being eighteen take the oaths, &c. But in the mean time the next of kin not being recusant, &c. shall enjoy, &c.

[212] This statute 3 Jac. was not intended to repeal 1 Jac. and does not prohibit the same offence; by 1 Jac. the person sent to be educated in seminaries, &c. was restrained from taking, &c. By the statute 3 Jac. any person going beyond seas without licence, &c. though he never was in any seminary, &c. and though he goes for any cause whatsoever, &c. and therefore *Tredway's* case, Hob. 73. does not relate to 1 Jac.

But by the statute 3 Car. the intention appears to be for the same purpose as the statute 1 Jac. for the title is to restrain the passing or sending any to be popishly bred beyond sea.

De Term. Pasch. 10 Annæ.

So the preamble takes notice, that divers have sent children to be bred up in popery, notwithstanding the restraint by the statute 1 Jac. and therefore it enacts, that the statute of 1 Jac. be put in due execution, and it extends to all offences restrained by 1 Jac. and more; for any sent into popish families to be instructed, &c. will be within 3 Car. 1. as well as persons sent to colleges, &c. So it extends to all monies, &c. sent to the relief of any such children, &c. which was not within the statute of 1 Jac. so it gives the same penalty against any person sending, &c. (who by the statute of 1 Jac. was only to forfeit 100l. as against the person sent; so it gives the penalty only upon conviction by indictment or information, which was not declared before by 1 Jac. so it gives all the penalties mentioned in 1 Jac. and also that the offender shall not sue nor be a legatee, &c. so it says he shall forfeit, &c. (in the same words as are used in 1 Jac.) to the crown, &c. which was not expressed in the statute 1 Jac.

So it requires conformity in six months, which by the statute 1 Jac. might be at any time, and upon conformity restores the party to his lands, and does not discharge the other disabilities, whereas the discharge by 1 Jac. was general.

The statute of 3 Car. 1. c. 2. therefore does not repeal, but enlarges and enforces 1 Jac. by which it appears, that the measure of the disability in the statute of 1 Jac. must be governed by 3 Car. 1. c. 2, and tho' offences before 3 Car. continue punishable by the statute 1 Jac. yet all offences since the statute 3 Car. are to be punished according to the direction of 3 Car. and consequently the disability and forfeiture upon the statute 1 Jac. and 3 Car. will be, that the person disabled shall lose all his lands to the king upon conviction during his life, if he does not afterwards conform.

And for these reasons judgment was given for the defendant in the Common Pleas.

But it was now argued in the King's Bench, upon a writ of error, by Sir THOMAS POWIS King's Serjeant,

First, That by the statute 1 Jac. 1. 4. & 6. *Charles Lord Gerrard* was a person disabled from taking the estate, and that his brother *Philip* being under the same disability, could not take the estate-tail in remainder limited to him, and consequently the remainder in fee to the lessors of the plaintiff shall take effect, and the estate vest in them.

O

Secondly,

De Term. Pasch. 10 Annæ.

Secondly, That 3 Jac. 1. and 3 Car. make no alteration in the construction of the statute 1 Jac. 1. 4 & 6.

Thirdly, That the recovery suffered by *Charles* Lord *Gerard* will of consequence be void.

As to the first point he argued, that the statute 1 Jac. was made at a critical juncture, when there was a great contest between the Papists and the Protestants, and therefore the legislature without doubt intended a severe penalty upon those who educated their children in Popery. The statute 27 Eliz. c. 2. §. 5. which prohibits sending relief to any jesuit, &c. or any other in seminaries, was but a temporary law; and therefore by 1 Jac. the restraint was positive and perpetual, and the offender is put under a disability to inherit, purchase, take, have or enjoy any manors, lands, &c. which words import he shall be disabled to inherit, purchase, or take any lands, &c. so as that lands shall never vest in him, if the disability was incurred before descent or purchase; that he shall be disabled to have or enjoy them, if they were vested before the disability incurred.

[214]

1 Vent. 216.

Co. Lit. 25,

b.

2 Rol Rep.

418.

Camd Eliz.

542.

And that by these words lands can never vest in such person who is not capable of taking, is evident from the words themselves, and was so resolved 11 Co. 1. Lord *Delaware's* case, that *William* was not Baron, but only an Esq. by which it appears, that the barony never vested in or descended to him.

So by the statute 11 & 12 W. 3. the words are in the statute 1 Jac. by which the person disabled, who cannot inherit, purchase or take, cannot take by disseisin, or by a tortious entry take or gain any freehold, for if he could, the act would be evaded: So in case of Simony the person is quite disabled for ever.

If it be objected, that by such a construction the heir will be defeated, though it appears by the act that he shall take; that is a mistake; for when the right of the heir is saved by the act, he shall take by descent, though the estate never vested in his ancestor; as in the case of Lord *Delaware* it was held, that the son took the barony by descent, though it never was in his father; and it would be unreasonable to make such a construction of the statute in order to preserve the right of the heir or posterity, which is but the secondary intention of the statute, as would defeat the primary intention of the statute, (viz.) the disabling the offender.

With regard to the proviso, that the offender shall be discharged from his disability upon his conformity, without any

words

De Term. Pasch. 10 Annæ.

words of restitution, it seems to be added for the satisfaction of some ignorant burghers, or shall serve the heir in pleading to make his descent.

The words of the act, that he shall be incapable to take any lands, manors, &c. cannot be satisfied by a disability to take the profits of the land; and if the intent of the statute had been such, it would have been said in express words, and another would have been named to take the profits in the interim, as it was in the statute 3 Jac. and the omission of one to take the profits in the interim was proper, where the estate never vested in the party. If it be said that the King shall take the profits, yet it would be in the power of the party to prevent the King by alienation, and therefore such a construction, as does not allow the estate to vest, answers better to, and promotes the end of the statute, which would be avoided if the party could dispose of his estate, which he might do if it vested in him; and such construction will the better deter parents from sending their children to be educated beyond sea, when they find it to be so penal; and judges ought by their interpretation to make laws for the promotion of religion answer their design, though the words may be imperfect for that purpose. Hob. 157. 11 Co. 70, 71. more especially when the words are plain and positive, as here; and penal laws have been construed by intendment, 11 Co. 34. and it cannot be denied but that the mischief intended to be remedied by this act is very great with regard to religion. It is also a rule in construction of statutes *in dubio* to adhere to the words, and by the words no common persons can think any thing else was intended but that the offending party should never take any lands, &c. The construction on the other side is advanced only to preserve the estate to the heir, but there is no necessity that the heir shall be excluded by our construction, for in Lord *Delaware's* case it was resolved, that the heir should take the barony, though it never vested in the ancestor.

But it is asked, in whom shall the estate be, if it is not in the party? Surely it shall not be in him, if it can be in any other, for the statute says expressly to the contrary; *et maxime est constructio quæ corrumpit viscera textus*. All that the necessary consequence of a statute, is as strong as if it was in the statute itself. Hob. 293. Brook. Coron. 204. If a statute says a man shall lose *vitam & mem-*

[216]

bra, it will be felony, tho' the statute does not name the offence felony. And therefore judges ought to enlarge the construction of a statute in favour of the intention, and not oppose rules of law to defeat the intent. In whom then shall the estate be? It cannot go to the king, if it never was in the party; it cannot go to the issue in tail, for *non est hæres viventis*. 1 Inst. 13. a. And therefore of necessity it must go to him in reversion. It is then objected, How shall it return to the party upon his conforming? For the statute has no words of restitution. To which I answer, that the intent of the act is not clear, that the estate which is gone to another shall revert upon conformity; but if the intent be so, the same act which makes the incapacity makes it revert, and therefore there is no necessity for any words of restitution; as where a statute repeals another act of repeal, the former statute is revived without any words for that purpose; and it is no new case, that an estate shall cease for a time by virtue of an act of parliament, and afterwards revive, as appears by the Prince's case, 8 Co. 1. So Raym. 355. in the Earl of *Darby's* case, it is said that the Judges ought not to construe the limitations of an act of parliament made for a particular purpose by the strict rules of law, for the parliament can controul the rules of law, can make a freehold cease as if the party was dead. 13 Co. 64. So by 21 H. 8. the freehold of a person who accepts of a second benefice with cure ceases. 6 Co. 40. b. Construction of statutes ought to be according to the rules of reason and convenience, Hob. 346. for laws are made *secundum æquum & bonum*, agreeable to the rules of natural equity, which is *lex legum*, Hob. 224. and therefore where the intention of a law cannot be attained by a construction according to the usual rules of common law, the Judges ought to intend that the parliament waived them, as in the Prince's case, 8 Co. 16. Where the Dukedom of Cornwall was limited *eidem duci & ipsius & heredit' suor' regum Angl' filiis primogenitis & dicti loci ducibus hæredit' successoribus* upon which it was resolved that the Dukedom should descend to the eldest son of the King, and such King who is heir to Prince *Edward*, who should take in the life of his father, which could not be by the rule of law.

There are many cases where by act of parliament an estate may cease for a time, and afterwards revive, cease as to one, and revive as to another; as in *Beaumont's* case, 9 Co.

Lucas Rep.

412

Lex Parlm.

2, 3, 35
&c.

10 Dyer,

274, pl. 40,

41, 360.

Raym. 355.

1 June, 460.

1 Keb. 265,

606.

Cro. Car.

543.

De Term. Pasch. 10 Annæ.

Co. 138. Hob. 257, 259. So where the baron and feme are tenants in tail, to them and the heirs of their bodies, and the baron levies a fine and dies, the estate revives as to the wife, who shall be tenant in tail, and then ceases as to the issue, who shall be barred by his father's fine.

[217]
Cro. Car.
478.
Cro. Jac.
689.
1 Co. 87, b.
1 Jon. 73.
Godb. 317,

325. Dyer 351, pl. 24. N. Benl. 325, pl. 257. 1 Andr. 39, pl. 101. Beryl. in Ash. pl. 27. Benl. in Kelw. 205. Pl. 7, 213. b. pl. 17. Dall. 50. pl. 16. Winch. 43.

So an estate may be in abeyance for a time. 1 Inst. 345. Vide Harg. a. Lit. § 646, 647, 649, 650. So a person in being shall be passed over as if he was dead, as a man professed. 2 Co. Litt. 342, b. in Ro. Ab. 150. b. So an estate may go to him in reversion, and afterwards return; as if tenant in tail dies without issue born, and his wife is *enfeint*, if a son be afterwards born, he shall take by descent. 7 Co. 8. b. Bro. Divorce 18. And therefore when the statute 1 Jac. 2. made an incapacity to take,

The next thing to be considered is, whether any subsequent statutes have altered the law in this point, and so taken off the disability.

2d point,
whether
subsequent
statutes
have taken
away the
disability?

It is not contended on the other side, that there ever was any express repeal of this statute, but the most they insist on is, that it is inconsistent with the subsequent statutes, and so implicitly repealed, according to the rule, *leges posteriores priores contrarias abrogant*.

But before he entered upon the consideration of the consistency or inconsistency of the statute, he observed that repeals by implication are to be used very tenderly, because they infer a very high reflection upon the law-makers, as if carelessly and unknowingly they made inconsistent laws. 11 Co. 63. 1 Ro. 91.

Repeals by
implication
to be used
cautiously.
2 Rol. Rep.
410.
Fortesc. c.
18. fo. 21.

It was given up in the Common Pleas, and agreed in this Court, that the statute of 3 Jac. relates to different persons and different offences than 1 Jac. and therefore he should pass it by and take no notice of it.

The statute 3 Car. is that which is set up by the other side to be the governing act and implicit repeal of 1 Jac. notwithstanding it enacts it to be put in due execution; which is sufficient to shew it was not intended as a repeal. [218]

It was said upon a former argument, that 1 Jac. was made upon a pinch, and when the bent of the nation was against the papists; and it being very severe upon them, 3 Car. was made to mitigate those penalties.

In

De Term. Pasch. 10 Annæ.

In order to answer this pretence, he resumed the historical part of the case, and considered the circumstances of the nation at the time of making the latter statute. During Queen *Elizabeth* and King *James's* reign, the people were very jealous of the designs of the Papists, and therefore we see by several acts of Parliament endeavoured to fence against them as well as they could. Upon King *Charles's* accession to the throne, their suspicions were rather increased than diminished; the King was then newly married to a daughter of *France*, a *Roman* Catholick, and several favours were at that time shewn to the Papists: this occasioned great uneasiness and disquiet to those of the Protestant reformed religion, which afterwards broke out into an open rebellion, and ended in the murder of that Prince and the banishment of his sons.

It is very well known, that the parliament which enacted this law, was far from being acceptable to the Court, and therefore it was suffered to continue but a short time, and then followed the long intermission of parliaments.

As this parliament was not in the interest of the Court, so they were highly incensed against the Papists, who they began to fear were likely to gain ground of them; and therefore they set themselves at work to attack them in that which was their weaker place, namely, in taking away the estates that were vested before the offence committed. 1 Jac. incapacitated them to take, and 3 Car. to keep.

[219] As to which the former statute was doubtful; if it should be construed that the measure of all these disabilities must be by 3 Car. then that Parliament, instead of distressing the Papists, as was intended, has rendered their condition more easy; for on 3 Car. a conviction is requisite, to avoid which they may keep abroad, and have the profits of their estates transmitted to them; for they will be out of the reach of any process necessarily previous to a conviction.

But the main end and design of this latter statute, which has not been mentioned, was to lay a heavier punishment on the person sending, who before forfeited 100l only; the child sent, who was the most innocent, bore all the resentment of the statute, whereas now both are put upon the same level, and some new disabilities are created; as being executors, &c. and it likewise extends to private schools, which the other did not,

Thirdly,

De Term. Pasch. 10 Annæ.

Thirdly, He came then to consider, what influence the common recoveries and the life of *Philip* will have in pre-judice of the Duchefs's title.

3d point,
the influ-
ence of the
common
recoveries.

Now as to this point he insisted, that what he set out with will principally govern it; for if the second *Charles* never had the estate in him (as according to my former reasoning he never had) then the recoveries will be void, as suffered by a person out of possession; as if the issue in tail should suffer a recovery in the life-time of his father.

A fine indeed he may, but that is by the express provision of the statute 32 H. 8. c. 36. As to the life of *Philip*, his objections, as to the estate's being in abeyance, and the way he had shewn how he or his issue may be restored on conformity, will be sufficient to remove that obstacle.

But to come closer say they, whilst there is issue the reversioner cannot enter.

He denied that, in this case issue must be heir of the body. Hob. 345. Dy. 332. Plow. 560. and he must be issue inheritable, which *Philip* is not; he is disabled, and cannot call for the estate according to 1 Ven. 417. He is to be considered in consanguinity, but not as heir; and if he himself cannot take, his issue cannot, (admitting him to have issue, which is not found, and is not so in fact; so that the argument is only from a possibility of his having issue) for it is not enough that he has issue, unless such issue be heir of the body to claim the intail; and heir of the body he cannot be in the life of *Philip*, for *nemo est heres viventis*. My Lord Coke 1 Inst. 377. a. puts the case of tenant in tail to him and the heirs male of his body, and he has issue a daughter, who has issue a son; a grandson, says he; shall not keep out the reversioner, though he be heir of the body, because he does not derive his descent through males; 'tis said of an exile, or one banished, *quod perdidit patriam*, and it will sound as well of *Philip*, *quod perdidit patrimonium*.

[220]

We are not obliged to wait for the possibility of his conformity; shall an estate stand suspended, because 'tis possible an alien may be naturalized, or a monk be derained? Cro. Eliz. 422. 29 Aff. pl. 61. 1 Inst. 391. Plow. 557. indeed says, there might be an occupant in that case; but this was said only *arguendo*, and 'tis contrary to Yelv. 9. 2 Rel. Ab. 151, 152. for he must claim by a *que estate*.

If an advowson be granted to A. for the life of B. and A. dies before a vacancy, the grantor shall present, and there shall be no occupancy.

The

De Term. Pasch. 10 Annæ.

Hawk. P.
C. 60.
2 Jones 26.
Stra. 529
1272, 362.

The next thing relied upon by the defendants is the act of 2 W. & M. of a general pardon, which, say, they, has cured all. This has been sufficiently answered by those who have argued before; as there are exceptions in it, and as it is not found, the Court cannot take notice of it. Hale's Pl. Cor. 252. Cro. Eliz. 125. 1 Keb. 20. 1 Lev. 26, 76. Br. Char. of Pardon, 46. Pleading, 124. 8 E. 4. 7. 4 H. 7. 8. the general words might pardon the offence, but would not restore the forfeitures without special words. 1 Lev. 120, 1 San. 362. If Simony be pardoned, yet that does not operate so as to restore the offender to the living. 5 Mod. 15.

[221]

The last thing they object is, that *Charles* was in possession all his life; and therefore the recoveries are good; but was this any other possession than that of a wrong doer? A monk might be a disseisor, and yet it will not be pretended he had any legal estate in him: no, he was but an occupant at best; and in this case *Charles* was no more; he had, 'tis true, a perannuity of the profits, but that is all; he had not such a possession and freehold, as to enable him to bar the remainder by coming in as vouchee in a recovery.

He desired to know, whether it will be pretended, that if a Papist at this day, since the statute of W. 2. should get into possession, and receive the profits of any estate, whether he can be deemed to be in legal possession? Certainly he cannot; he cannot take advantage of his own wrong; and no more shall the tortious entry of *Charles* for such it was enured to his benefit, and turn the prejudice of us who are in reversion.

He said there was one thing more which they press upon him, and that is, that he could shew no instance where this act has been put in execution in the manner he was contending for, or indeed in any other manner.

But he thought he might retort the argument upon them, and demand to know if they can produce any case which seems to look their way, and so much as countenance the construction they have set up; the truth in the matter is still at large, and no argument can be drawn by either side.

Many statutes there are in full force upon which there are no footsteps of any proceedings for many years; and as to this particular statute, he could give them a very good reason why it was never yet drawn in question; they of the
same

De Term. Pasch. 10 Annæ.

same religion will never take advantage of it, and these are people who mostly have it in their power; though in our case indeed the reversioner is a Protestant; besides, 'tis very difficult to prove a foreign education, and a being sent abroad with the intent; for the Jesuits, though they were caught in this case, will never be caught again.

None but a man of Duke *Hamilton's* application and interest could have brought them over: but now they know the consequence, they will never be prevailed with to give the same testimony; and as this is the first case upon the statute, so in all probability it will be the last. [222]

Sir EDWARD NORTHEY, *cont'*: I shall not need to go about to prove a title upon this record for the defendants; for they have a prior possession, and that is sufficient against the plaintiff, who must recover upon his own strength.

The plaintiff relies on the statute of 1 Jac. only, but in my argument I shall put them all together, and admit them to be consistent; for my Lord *Coke* says, where there are several statutes relating to the same matter, one must not be singled out from the rest, but the construction must be uniform upon them all. 11 Co. 61.

The three statutes now in question were all made with the same view, and to prevent the same mischief; that was to be brought about by laying punishments upon the offenders, and thereby obliged them to conform.

There are two sorts of offenders, those who send, and those who are sent; and these latter forfeit only the profits of their estate; and that was taken to be the consequence of the statute at the time of making it; and therefore 3 Jac. does not make any new law, when it speaks of the profits, but only directs the particular application of them to the next Protestant of kin, which under 1 Jac. the King, as *pater patriæ*, was intitled to. 2 Vent. 187. *Woodward* and *Fox*.

The plaintiff does not make the case on 1 Jac. which respects only the intent, but has brought it within the words of 3 Car. for it is found, that they were actually educated; which is carrying the intent to the education.

I shall put every thing out of the way but the operation of the statutes, as to the descents; I would fain know, if this were an estate in fee descended, who shall have it; the heir according to their maxim cannot; and shall it escheat to the Lord, as tho' the whole estate was spent; can it be thought the statute intended to favour the lord or reversioner [223]

De Term. Pasch. 10 Annæ.

sioner more than the innocent issue? he must be prejudiced, unless it be construed that the profits only are forfeited.

The construction must be, that the ancestor shall take no benefit; that is, he shall not take for the benefit of himself, but he shall take for the benefit of his posterity.

The statute 11 & 12 W. 3. has the words, *be disabled to inherit or take*; but yet in the case of *Pye and Gorge*, 1 July 1709. in *Canc'*, it was held, that the subsequent words had controuled the former, and only carried away a pernanacy of the profits, but that the estate descended notwithstanding.

A man may take for the benefit of another, as a man attainted for the benefit of the crown. 1 Inst. 2. b. 2 Rol. Ab. 83.

I put all the rules of law out of the case, and come now to the proviso for conformity; and I take it that upon conformity the offender is to be *in statu quo*; and if so, how can the estate be revested; there is no provision for it in the statute, and that is an argument it was never intended the estate should go over.

My Lord *Delaware's* case, cited by the other side, is a case which has room enough in it to hold us both; it says, that *Thomas* shall claim from *William*, and not through him.

Now the word *from* implies he was seised, for otherwise he could not claim from him; here the estate-tail is not spent, and therefore the reversion cannot be let in.

It is objected, that the freehold shall not be in abeyance.

I answer, that it is not, it is in the offender; and the statute has power for to controul that, or any other rule of the common law.

[224] It is said *Philip* has no issue, and the reversioner must not be obliged to wait upon that contingency.

I answer we must provide for what may be, as well as what is; the law never sees any impossibility of having issue, and therefore upon a general intail there can never be a tenant in tail after possibility; there is a possibility of *Philip's* having issue, and therefore the estate must continue to serve that possibility when ever it arrives.

Another objection is, that if we have the estate we may perhaps alienate it.

I answer that the statute never intended to put the issue out of the power of the ancestors, but only that he should not be hurt by the disability of the ancestor, he shall be disabled

De Term. Pasch. 10 Annæ.

disabled as to himself, he shall not be disabled as to his heir.

We do not now lie on the recoveries, but set up the life of *Philip* against the plaintiff; I agree if tenant in tail leaves issue an alien, there the remainder-man may enter, because such issue is as none.

If therefore the issue vests, and the profits are only forfeited during the disability, then the lessor of the plaintiff can have no title.

Sir THOMAS POWIS replied. In Lord *Delaware's* case, it is said the title never was in *William*, he was only an executor, and this destroys the inference from the word *from*.

As to the case of *Woodward and Fox*, it is a case *prima impressionis*, and a long while after this statute, so that the law-makers could not know the profits would go to the crown of course, it not being a case settled till that case; in *Delaware's* case the same construction was made without the words, which we make with the words.

I know no body to whom the estate could have gone, [225] in case this had been a descent in fee, but to the Lord by escheat; and it is no new doctrine to divest estates escheated, as on the birth of a posthumous heir, or reversal of an attainder, 3 Inst. 231, and the same may be done on *Philip's* conformity.

The Court took time to consider, and afterwards in Mich. Term 7 Geo. 1. they were divided in opinion, the Lord Chief Justice PRATT, and Mr. Justice FORTESCUE being of opinion that the judgment below was erroneous and ought to be reversed; Mr. Justice POWIS and Mr. Justice EYRE being of the contrary opinion; whereupon at the request of the Duchess, and for her expedition, the judgment was affirmed; and she bringing a writ of error in Parliament, the judgment was affirmed there likewise by the advice of ten Judges against two.

Term. Sanct. Trin.

1 Geo. In C. B.

Case 125

If a trustee has conveyed lands before execution sued, tho' he was seised in trust for the defendant at the time of the judgment, the lands cannot be taken in execution.

Hunt and Coles, & al'

EJECTMENT on the demise of *Jacob Boardman*.

The defendant pleaded not guilty; and on a trial at the assizes in the county of *Essex*, before Mr. Justice TRACY, the case appeared to be this; viz.

Benjamin Stock was seised in fee of the lands in question, and by indenture 11 Oct. 1682, conveyed them in consideration of 1270l. to *Hen. Soursby*, and his heirs, who was only a trustee for *Peter Chamberlain* and *Anne* his wife, and their heirs, and by indenture 11 Dec. 1682, between the said *Hen. Soursby* of the one part, and the said *Peter Chamberlain* and *Anne* his wife, and *Hope Chamberlain* their son, of the other part, it was agreed, that *H. Soursby* should stand seised of the premises, to the intent that *Peter Chamberlain* and *Anne* his wife should take 40l. a year for their lives, and that the rest of the profits should be paid to *Hope Chamberlain*, and the heirs of his body.

Trin. 7 W. 3. 1695. *Jam. Boardman*, lessor of the plaintiff, being executor of *Jer. Boardman*, recovered judgment against *Hope Chamberlain* for a debt of 160l. due on a bond from *Hope Chamberlain* to *Jer. Boardman*; 26 July, 1699. *Anne Chamberlain* and the said *Hope Chamberlain* borrow 609l. of the defendant *Coles*, and for a security for that sum the said *H. Soursby* by their direction mortgaged the premises to the said *Coles* for 500 years; Trin. 1714, the lessor of the plaintiff obtained judgment on a *scire facias* upon the first judgment, and upon this took out execution by *elegit*, and the sheriff, after an inquisition which found that *Hope Chamberlain* was seised in fee, extended one moiety and delivered it to the lessor of the plaintiff; and the doubt was, if he had any title by the statute 29 Car. 2. c. 3. by

by which it was enacted, that after 24 June 1677, it shall be lawful for every sheriff, &c. to whom writs shall be directed, on judgment, &c. to deliver execution to the plaintiff of all such lands, &c. as any other person shall be seised of, &c. in trust for him against whom execution is sued, like as he might have done if the said defendant had been seised of such lands, of such estate as they had been seised of in trust for him at the time of the said execution sued. And after argument by Sir CONSTANTINE PHIPPS and myself for the plaintiff, and Sir EDWARD NORTHEY for the defendant, it was determined by Mr. Justice TRACY, that the execution was not good; for the words, *at the time of the said execution sued*, refer to the seisin of the trustee; and therefore if the trustee has conveyed the lands before execution sued, though he was seised in trust for the defendant at the time of the judgment, the lands cannot be taken in execution. And Sir EDWARD NORTHEY said, that ever since the act such construction had been thought agreeable to the statute, though he did not know it had ever been judicially determined. And a case was mentioned by Mr. Justice TRACY from Serjeant CHESHIRE's notes, where this opinion seemed to be allowed by Lord TREVOR, and was not contradicted by the Court, *Johnson ver. —*, in the Common Pleas,—Annæ.

Term. Sanct. Mich.

2 Geo. I. In C. B.

Case 126

Anonymous.

There must be a particular act shewn by which the plaintiff is interrupted, otherwise the breach of a condition for a quiet enjoyment, is not well assigned.

ACTION upon a bond, with a condition, reciting, That whereas the obligor had purchased a copyhold tenement from the Dean and Chapter of ———, if therefore, during the continuance of his right, estate and interest therein, he shall permit the obligee to have and enjoy a moiety of all the profits of the said tenement, then, &c.

After Oyer the defendant pleaded the condition performed; to which the plaintiff replied *quod tentum præd', unde præd' obligor was seised by grant for the term of his life, fuit in possessione Johnson virtute dimission' ei fact' per præd' oblig'* & *quod* obligor did not permit him to have and enjoy the moiety of the profits according to the condition, *sed ipse recepit tot' reddit' tenti præd' pro anno finit' ad Fest' Sancti Michaelis.*

The defendant demurred to the replication, *quia duplex & caret Forma.*

And Serjeant PENGELLY insisted that the replication was bad;

First, because it did not appear that the tenement mentioned in the replication was the same tenement which is recited in the condition; in the condition there is no notice taken what estate or interest the obligor had purchased, but only said that the obligor had purchased a copyhold tenement; then when he says *tentum unde præd' obligor* was seised for life, *non constat* that it is the same tenement which is mentioned in the condition.

[229] Secondly, There is no good allegation of the demise to Johnson, for he alledges that Johnson was in possession *virtute dimission'* and the *virtute* is not traversable.

Thirdly, The breach is double, for he says that the obligor did not permit him to enjoy the moiety of the profits

De Term. S. Mich. 2. Geo. 1.

fits according to the words of the condition, and then he shews that he received all the rent for such a year, which will be another breach.

To which it was answered by Serjeant BRAINTHWAITE, and resolved by the Court, that the replication here was good, for the recital *quod te'ntum unde* he was seised for life, is only an inducement to the subsequent matter, and not traversable, for the defendant is concluded by the condition from saying that he had not such tenement, and if he pleaded *Nul tial' tenemen'* it would have been a bad plea; then it is immaterial to say it was granted to him for life, for it had been sufficient to have said *quod te'ntum præd' fuit dimiss'* to such a one, and that the defendant had received all the rent.

As to the breach it is well assigned; if it had been double that must be shewn particularly for cause of demurrer, and in what point the duplicity consists, and it shall not be held bad upon a general demurrer; but here the assignment of the breach is not double; for when he says that the defendant did not permit him to enjoy the moiety of the rent according to the words of the condition, this would not have been sufficient without shewing some act done which amounts to a disturbance, and therefore it was necessary for him to go further, and shew that the defendant received all the rent, without which the breach would not have been complete; and so it was resolved in *Frances's case*, 8 Co. 89, b. where it is agreed that there must be a particular act shewn by which the plaintiff was interrupted; otherwise the breach would not be well assigned.

For these reasons judgment was given for the plaintiff.

2 Vent. 129.
6 Mod. 150.
Vide Cro.
Jac. 567.
Garnet and
Taylor.

Southgate *versus* Chaplin. In C B.

[230]
Case 127

DEBT upon a bond, with condition that the obligee shall enjoy without interruption by any person having or claiming, or pretending to have any right of common.

Defendant pleaded condition performed.

The plaintiff assigned for breach, that he was interrupted by *Jer. Bye*, who claimed common in the close aforesaid *ut ad te'ntum suum de tempore cujus contr' memoria hom' non existit pertinen'*; and upon a demurrer it was urged by Serjeant BRAINTHWAITE that here is not shewn by the replication any title to common in *Jer. Bye*, and the condition

shall

A covenant to enjoy without disturbance generally, shall be construed a disturbance by legal title; but where a man covenants expressly against those who claim

or pretend
to have a
right, the
breach is
well assign-
ed tho' the
disturber has
no legal
right.

shall not be extended but to legal titles; and many cases were cited to this purpose.

To which it was answered by Serjeant REYNOLDS, and resolved by the Court, that the covenant here extends by the express words to those who claim a particular interest; viz. in this land; and not only to those who have a right of common; for where a man covenants that another shall enjoy without disturbance generally, that shall be construed of a disturbance by legal title; for in other cases he has legal remedy; but where a man covenants expressly, not only against those who have right, but against those who claim or pretend to have a right (and the words here are by *any person having, claiming or pretending to have*) not a right in general, but common, which is a particular interest; and then the breach is assigned in the words of the covenant that he was interrupted by *Jer. Bye*, who claimed common, *ut ad te'ntum præd' de tempore, cujus, &c. pertinen'*, for here the obligee shews that the claim was not by any title subsequent to his title, but by a title which was time out of mind, &c. and whether the title be right or groundless, yet it was the intent of the parties that the obligor should indemnify the obligee against all claims of common.

Judgment for plaintiff.

[231]

Prideaux ver. Roberts. In C. B.

Case 128

Whether words in the condition, which are repugnant to the plain intent of the parties, shall be rejected.

DEBT upon a bond with condition for performing an award.

And upon Over demanded the condition was intire in these words, *Whereas the above bounden J. P. (who was plaintiff) and the above-named J. P. had submitted themselves,* &c.

The defendant pleaded no award made; upon which the plaintiff replied, and shewed the award, and assigned the breach; and the defendant demurred.

And for the defendant it was insisted, that it did not appear that the defendant had submitted, for the submission is by the plaintiff only.

To which Serjeant PENGELLY answered, that it would be good notwithstanding this mis-recital; for when he says *the above bounden* (who was the defendant, and by the bond it appears that the defendant was bound) then the subsequent words *J. P.* which was the name of the plaintiff himself,

self, shall be rejected as repugnant ; for it would be sufficient to say, *whereas the above bound and the plaintiff had submitted themselves, &c.* as where a bond is upon condition, *that if the obligor pay such a sum, then the obligation shall stand in force* ; these last words shall be rejected as repugnant to the intent of the parties, which was, that if the obligor paid, &c. the obligation should be void ; and there the mistake was in reciting the condition of the counter-bond.

The Court inquired if he could shew any authority for rejecting the name of the party in such a case ; and because he could not it was adjourned.

Yalden ver. Hubburb. In C. B.

Case 129

ACTION upon the case for diverting a water-course Judgment shall not be arrested after a verdict where intire damages are given, tho' part of the time was to come at the time of trial Jan. 1 *Georgii*, and continuing it to March 1715. *per quod* plaintiff lost the benefit of the water-course *abinde* till *Apr. tunc prox' sequen'*

And after verdict for the plaintiff, Serjeant PENGELLY moved in arrest of judgment, that intire damages were given, when part of the time was to come at the time of the trial ; for as he alledges continuance till *March 1715*, which is not yet passed, and the damages are given for the time till *April prox' sequen'* that is till *April* next, and so the jury in their giving damages had consideration of a time not passed at the time of their giving the verdict ; and it was likened to the case of *Hambleton ver. Vere*, 2 Saund, 169. Action upon the case against an apprentice for relinquishing his service before the end of his term, *per quod servitium amisit per tot' resid' termini præd'*, when only two years of the five, for which he was bound, were past. And after verdict judgment was arrested, for that damages were given for the loss of his service during the whole residue of a term, of which part was not then incurred. *Sed non allocatur* ; for *per cur.* the time mentioned *March 1715*, not being then incurred, it was impossible ; for at the time of the action it was not possible that the diversion of the water-course had continued till a time then not come ; and therefore when he alledges, that he lost the benefit of the water-course till *Apr' prox' sequen'*, that is also impossible, and therefore the jury could not have any consideration of it.

Judgment for the plaintiff.

P

Right

Where
there is no
devise an-
tecedent,
the first son
of the wife
cannot take
by way of
remainder.

[253]

EJECTMENT on the demise of *Bucknall* and his wife, *Horsely* and his wife, *Colburne* and his wife, and *Sarah Came*, against the defendant, for some tenements in *Woolwich* in the county of *Kent*. And on the trial at the assizes in *Kent* before Lord Chief Justice *KING* the case was this :

Thomas Came being seised of the premisses, by indentures 3 & 4 June 1668, settled these tenements to the use of *Thomas Came* his son for life, remainder to *Mary* his wife for life, remainder to the right heirs of the son, and dies. *Thomas Came*, the son by his will 20 Oct. 1673, devises in these words, viz. "My lands by *Woolwich*, my wife is to "enjoy for her life, after her death of right it goeth to "my daughter *Elizabeth* for ever, provided she hath "heirs; if my said daughter should die before her mother, or without heirs, and my said wife *Mary* should "marry again, and have an heir male, I bequeath to him "all my right to that estate, not thinking I can sufficiently "reward her love; if my said wife marries again, and "fails of heirs male after her decease, and my daughter "she failing of heirs, I bequeath 50*l.* *per annum* of that "estate to my brother *Joseph Came*, and to his heirs; 20*l.* "per annum to my sister *Sarah Maddeson* and her heirs, provided it come not into the hands of her husband; 30*l.* "per annum more I bequeath to my brother *William Came* "and his heirs; and the residue I leave to the disposal of "my brother *Joseph Came*.

Thomas Came the son died without issue male, having only one daughter *Elizabeth*, who died without issue, and the lessors of the plaintiff are heirs at law to her, viz. *Elizabeth*, *Mary*, *Catherine* and *Sarah*; the lessors are the co-heirs of *John Came*, brother of the said *Thomas Came*.

Mary, the wife of *Thomas Came* junior, after his death married *Thomas Hammond*, by whom she had issue the defendant.

A case was made for the consideration of the judge, who afterwards sent it to the Court of King's Bench, where it was argued by myself for the plaintiff, and by Serjeant *Pengelly*, for the defendant; and afterwards by Mr. *Lutwyche*, and Mr. *Reeve* for the plaintiff, and by Sir *Thomas Powell* and ——— for the defendant.

And

And for the plaintiff it was insisted, that the lessors of the plaintiff are the heirs at law to whom the estate belongs, if it is not disposed of otherwise by the will of *Thomas Came*.

That by this will nothing passed to the defendant; for he could not take but by way of remainder, or by way of executory devise; and he could not take by way of remainder, because nothing is devised to *Elizabeth* the daughter, for the will does not give her any estate but only recites the estate which she had before, for it says his wife shall enjoy for her life, and after her decease of right it goes to his daughter for ever, provided she has heirs, which is only a narration or recital of the estates as they were by the marriage settlement. [234]

And afterwards judgment was given for the plaintiff upon the first point, that here was no devise to *Elizabeth*; and then the first son of the wife by her second husband could not take by way of remainder. And afterwards in another case between the same parties in Chancery, Mich. 9 Geo. for an estate in *Essex* which was purchased by *Thomas Came* in the name of trustees, pursuant to his marriage articles, and which was to be settled according to the limitations in the indentures 4 June 1568, and which after the death of *Thomas Came* 1675, upon a bill exhibited by *Mary* his wife and *Elizabeth* his daughter, was settled upon *Elizabeth* in tail, and for default of such issue to *Mary* in tail; and it was now prayed upon the bill exhibited by the heirs at law of *Elizabeth*, that the estate in *Essex* should be conveyed to them, for the decree 1675 directed the settlement to be pursuant to the will of *Thomas Came*; but according to the judgment of B. R. the will of *Thomas Came* did not alter the estate of *Elizabeth*, and therefore the settlement to *Elizabeth* in tail, and then to her mother in tail, was an irregular execution of the decree, and therefore the trustees ought to convey to the plaintiff. And the master of the rolls was of the same opinion, for he thought that *Elizabeth* did not take any estate by the will of *Thomas Came*, which did not make any devise or gift to her, but only recited that his wife was to enjoy it for her life, and that after her death of right it was to go (not that he gave it) to his daughter.

D E
Term. Sanct. Hill.

2 Geo. 1. In C. B.

[235]

Case 131

Steward & ux' ver. Allen & ux'.

Words which do not directly charge the party with being a whore, are not such where the jurisdiction of the Spiritual Court ought to be disallowed.

PLAINTIFF prayed a prohibition to the Consistory Court of London, on a suit there for defamation; and the suggestion charged, that there was a libel against the defendant in the Spiritual Court, for that the wife of the defendant said of the wife of the plaintiff, *That she picked up a man in Fleet-street and carried him home, and carried him up stairs into her bed-chamber, where he threw her down on the bed and put his finger super ejus secreta, &c.* And the custom of London was alledged, by which a whore was to be carted; and therefore when there is a libel for calling a woman a whore, a prohibition will be granted; and the words in this libel are tantamount, and therefore it was prayed here. *Sed non allocatur*; for words which do not directly charge the party with being a whore, are not such whereon the jurisdiction of the Spiritual Court ought to be disallowed; and therefore a prohibition was denied.

2 Lutw.
1039.

And the authority of the case in *Lutw.* — *Houblon ver. Millner* was much relied on; and though the Chief Justice mentioned a case in the King's Bench, where a prohibition was granted upon a libel for words which did not directly charge the party with being a whore by express words, and that the case in *Lutw.* — was there cited; yet it appeared that case was not much considered, and therefore upon the authority in *Lutw.* — the prohibition was now denied.

[236]

Case 132

Lutham ver. Jarrett.

Opus & labor may signify business or task, as well as work and labour.

INDEBITUS ASSUMPSIT. After a writ of inquiry executed, Serjeant HALL moved that the writ of inquiry should not be filed; for when the plaintiff declares *quod cum ipse præd' Johannes Jarrett indebitat' fuisset eidem Thoma Lutham*

De Term. S. Hill. 2 Geo. 1.

Latham pro diversis operib' & laborib' ipsius Johannis in & circa ejus negotia ad special' instanc' & requisitien' ipsius Johannis per ipsum Thomam ante tunc fact' & performat', here appears no consideration for the promise of the defendant, for it is said, that he was indebted *pro operib' & laborib' ipsius Johannis*, and the work and labour of the defendant himself was not any consideration upon which a promise could arise or enure to the plaintiff. And upon this a rule was obtained *nisi*, &c

And I now insisted, that taking all the words together there appeared a sufficient consideration; for if the construction now put upon the words prevails, then the words (*per ipsum Thomam ante tunc fact' performat', &c*) must be rejected; for it is impossible that the work and labour done by the defendant (if the words are understood in that manner) could be performed by the plaintiff; but *pro operib'* does not signify only for the work, but the business also; and that is a signification well known and allowed; if it be understood in that sense, then all the words may well stand; for then the declaration is, that the defendant was indebted to the plaintiff *pro diversis operib'*, (*viz.*) for several businesses of the defendant *circa ejus negotia*, and at his request performed by the plaintiff; and the Court was of that opinion, and the first rule was discharged. As to the word *laborib'*, that might be either rejected, or it may signify also task or enterprise, as well as labour.

John Earl of Clanrichard *ver.* Bourk & al'.
In the House of Lords.

[237]

Case 133

WILLIAM late Earl of CLANRICHARD was seised in fee of the barony of *Dunkelling*, and other manors and lands in the kingdom of *Ireland*, subject to a debt of 20000*l.* and to other debts to the value of 10000*l.* and being so seised upon his marriage with *Ellen*, now Countess Dowager of *Clanrichard*, made a settlement of the said barony, manors and lands on her for her jointure, remainder to the heirs male of the family; and afterwards died without issue, and without having satisfied the incumbrances charged on the jointure. Afterwards, upon a reference by the parties interested in the debts and the estate, it was agreed, that the Countess should have 900*l.* *per annum*, Earl *Richard*, who was the heir male, 700*l.* *per annum*, and that the

A person restored after an attainder for High Treason, shall have the same equitable interest in every part of his estate, as he had before the attainder.

the residue of the profits should be applied to pay the debts; and after debts and incumbrances satisfied the Countess should have 1500*l.* *per annum*. In the reign of King William the persons in remainder became attainted for High Treason, and by the statute 11 & 12 W. 3. all estates forfeited, &c. in *Ireland* were vested in trustees for the benefit of the publick.

After this statute the Countess claimed her jointure before the trustees, and her claim was allowed; and the creditors, who had incumbrances on the jointure-estate, made their claims for their respective debts, which were also allowed.

[238] By the statute 1 Annæ, — John Earl of *Clanrichard* was restored to his honour and estate in the same manner as if he had not been attainted. Then a bill was exhibited in the Court of Chancery in *Ireland*, to be quieted in possession of such part of the estate as was allowed to him by the award. To which the defendant pleaded the statute 11 & 12 W. 3. and the claim allowed to the jointress of the estate limited to her in jointure, in bar to the demand by the award; and the plea was allowed with costs. From which decree the Earl appealed to the House of Lords here.

And I insisted, that by allowance of the jointress's claim by the trustees all equitable demands upon the jointure were consequently allowed and revived, though no express claim was made of them. If the jointress had made a mortgage of the estate limited to her for her jointure, or had agreed to grant a lease of part of the lands, the mortgagee or lessee, or the person with whom such agreement had been made, need not claim their interest, but by the allowance of the jointress's claim their demands of her would be revived; and the case would be the same where incumbrances made before the jointure affect the estate limited in jointure, and an agreement is made touching the manner in which those incumbrances shall be satisfied.

When the claim was allowed, the claimant was to enjoy her jointure as against the publick, but not as against those who had any claim or title paramount; and the decree of the trustees says, that the claimant shall have her jointure-estate according to the intent of the settlement in 1676, by which the jointure was settled, and by that settlement it was subject to the payment of debts; and therefore the decree is tantamount to saying, that she shall enjoy it subject to her proportion of the incumbrances; which proportion was fixed and ascertained by the award.

De Term. S. Hill. 2 Geo. 1.

And the statute 1 Annæ, — does not vary the case; for the appellant does not take his estate as a purchaser under that statute, but he is restored to it in his antient right, as if he had never been attaint, and so are the exprefs words of the statute; and therefore he shall have the same benefit and advantage as if he had never been attaint.

But by the statute of 1 Annæ, a proviso is added, that all adjudication and decrees of the trustees are confirmed in the same manner as if the said act had never been made; but this proviso does not give those decrees any validity which they had not before, but only puts them in the same plight and condition as they were upon the statute 11 & 12 W. 3. and therefore every body shall have the same advantage upon the estate allowed by any claim, as they might have had by the said act 11 & 12 W. 3.

[239]

And this is so *a fortiori* because no claim could have been made for the benefit of the award, which does not give any of the parties an interest out of the estate, but only apportionments and ascertains the payment of debts to which the estate was subject before.

For these reasons the decree in *Ireland* was reversed, and the appellant was allowed the benefit of the award.

DE

Term. Sanct. Trin.

2 Geo. 1. In B. R.

Case 134

The King *ver.* Osborn.

An information shall go against the Mayor, where person, intitled to their freedom, and demanding admittance, are refused.
Vide 1 Salk. 374.

AN Information in the nature of *Quo Warranto* was prayed against the defendant, who claimed to be mayor of the borough and port of *Hythe* in the county of *Kent*, and upon the affidavits the case appeared to be this: The usual day for the election of a mayor of this borough and port is the 2d of February, and upon the 2d of February last a court was assembled by *Stokes* the late mayor for that purpose. At the first meeting the orders of the last court were read, by which it was ordered, that one *Lake* should be admitted to his freedom of the said borough, paying 50s. for his fine, and *Lake* being then present paid 50s. and was admitted a freeman of the said borough; the right to the freedom of the said borough was either by birth, service, marriage, or redemption, viz. The son of a freeman born since the admission of his father within the borough, and being of full age, and being inhabitant and resident within the borough, has a right to the freedom. So whoever married the daughter of a freeman, born within the borough since the admission of her father to his freedom, being of full age, and inhabitant and resident within the borough. So whoever had served an apprenticeship to a freeman, and whoever had been allowed by the Corporation to be admitted to their freedom upon a fine. These being the titles to the freedom of the borough, after the orders read, and *Lake*, admitted to his freedom according to the custom, *Stokes* laid down his staff, and then a horn was sounded to summons the freemen to the election of a new mayor; upon which all who were before admitted to their freedom came, and six others who were not admitted but who claimed title to be admitted either by birth or marriage, came and prayed to be admitted; upon which *Stokes* informed

[241]

De Term. S. Trin. 2 Geo. 1.

informed them they came Irregular, and that there should be no admission that day. Upon which they declared their votes for one *Austin*, and then departed.

The others proceeded to an election, and upon the poll *Osborn* had 4 votes, and *Austin* 20; so that *Osborn* had the majority of votes admitted to their freedom, and *Austin* the majority, if the votes of those six, who demanded their freedom and were refused, were good.

And upon the opinion of PARKER Ch. J. POWIS and PRATT, an information was directed against *Osborn*, for that if the six were intitled to their freedoms, and demanded and were refused, all that could be done on their part was performed, and they ought not to be deprived of their votes by the tort of the mayor who would not admit them.

But EYRE *e contra*, for by such a construction all *mandamus's* for their admission would be superfluous, and though they have by birth or marriage a qualification to be admitted to their freedom, yet no right to it is vested in them till their admission, and till they have performed all that a freeman ought to perform to complete his freedom.

And therefore it is not like the case of a copyholder upon whom a copyhold descends, and he may maintain in ejectment and make surrender before admittance.

But by the three other justices the information was granted; but PARKER Ch. J. thought that if there had not been a direct refusal, it would have been otherwise.

Afterwards in the same term, according to a proposal of the Court, and by the consent of the parties, feigned issues were directed to try if these six, or any of them, were intitled to their freedom, and whether *Austin* or *Osborn* were duly elected, and proceedings upon the information were staid till the trial of these issues. *Vide postea* 243.

[242]

Daw ver. Newborough. In C. B.

Case 135

IN Ejectment upon a special verdict found at the assizes before Baron PRICE, the case appeared to be this :

The dean and chapter of *Bristol* were seised of the rectory of R. and granted a lease to J. C. for three lives, the lessee by lease and release conveys to his eldest son *Thomas* and his heirs, in consideration of natural love and affection, and for divers other good causes and considerations,

A conveyance cannot operate by way of covenant to stand seised, where the intent of the party to who conveys appears.

De Term. S. Trin. 2 Geo. I.

pears to be
contrary to
such a con-
struction.

to the use of the said *Thomas* for life, then to the use of the heirs male of his body, and in default of such issue to the use of his son *Joseph* for life, remainders to his heirs male, and in default of such issue to the use of the lessor of the plaintiff.

The lessee had issue *Thomas* and *Joseph*; *Thomas* had issue, *Mary*, who was married to the defendant, and died without issue male; *Joseph* died without issue male; by which means the lessor of the plaintiff claims; and if this was a good conveyance to the lessor of the plaintiff by way of covenant to stand seised was the question.

Serjeant PENGELLY argued that this conveyance operated as a covenant to stand seised; and that the exility of the estate of the lessee, who was only tenant for three lives, did not obstruct the title of the lessor of the plaintiff.

Intent of
the party is
essential to
the direc-
tion of uses.

And afterwards Trin. 3 Geo. the Court gave judgment, that this did not operate by way of covenant to stand seised.

1 Rol. Abr.
790.

Moor 342.

Noy 19.

Winch. 60.

1 Salk. 237.

2 Willf. 75.

[243]

Fitz. 237.

Gilbert on

uses, 116.

Powell on

Dev. 191.

2 Bl. Com.

330.

3 Burr.

1490.

4 Shep. Ab.

180.

Cowp. 94.

Doug. 716.

1 Term

Rep. 435.

2 Term

Rep. 91.

Cro. El.

423, 493.

There can-

not be an

use upon an

KING C. J. delivered the reasons of that judgment, that a conveyance cannot operate by way of covenant to stand seised, where the intent of the party who conveys appears to be contrary to such a construction, for the intention of the party is essential to the direction of the uses. But here the intent of J. C. appears to be, that the estates which he limits by way of use should arise out of the estate limited to *Thomas* and his heirs, and then they can never enure by way of covenant out of the estate of the covenantor; and to this purpose are the resolutions in Cro. Eliz. 401. 1 Sid. 82. 2 Vent. 318. And when the estate is limited to *Thomas* and his heirs, to the use of, &c. the use must of necessity arise out of the estate of the feoffee, &c. to the use, &c. and therefore, if it be to the use of *Thomas* and his heirs, and after to the use of others, this will be an use upon an use which will never be allowed by the rules of law; for the use is only a liberty or authority to take the profits, but two cannot severally take the profits of the same land, therefore there cannot be an use upon an use.

But this is now allowed by way of trust in a court of equity. 2 Black. Com. 329.

use upon an use. Moor 509. 1 Leon. 148. 3 Salk. 386.

IN an action upon the case, the plaintiff declared on a feigned issue directed by the Court of King's Bench, and the issue was, whether the plaintiff or defendant was duly elected mayor of the port and borough of *Hythe*, one of the cinque ports in the county of *Kent*; and upon the trial at the assizes at *Maidstone* July 1716, before the Lord Chief Justice PARKER, the case appeared to be this:

Vide ante 240.
Where persons have a right to their freedom, the tortious refusal of the mayor does not make their votes void, for admission is but a ceremony.

By the charter granted to the corporation of *Hythe*, 14 March, 16 Eliz. the election of the mayor is to be on the 2d of February, annually, *Et si aliquis major obierit ante finem anni, proximo die post notitiam, &c.* a new mayor shall be elected for the residue of the year. 9 August 1715, Mr. *Deeds* then mayor died, *Et eodem die circiter undecimam horam* the horn was blown, which was the usual notice of summoning the court, and the officer was also sent to summon all the burgesses of the corporation; upon which 20 were assembled, and elected *Stokes* mayor for the remainder of the said year.

Upon the 2d of Feb. next ensuing, when the annual election of the mayor is appointed by the charter, *Osborn* and *Austin* were candidates, and the election is to be *per jurat' & communitat'*. [244]

After the Court was assembled, one *Lake* (who at a former court had been ordered to be admitted to his freedom upon the paying a fine of 50s.) paid his fine and was sworn in a freeman, and took the oaths of allegiance and supremacy, and then the other officers of the corporation were continued and sworn in, and then *Stokes* the mayor said that he would proceed to the election of a new mayor. Some persons present said that there were others who would take up their freedom; to which *Stokes* replied, that he would not do any business that day except electing a new mayor, and then laid down his mace, and the horn was blown to summons the freemen to the election of a mayor.

Then *Tournay*, *Brockman*, *Geo. Kennet*, *Richard Kennet*, *Symonds* and *Rand*, who claimed a right to be admitted to the freedom of the port and borough of *Hythe*, entered the court and demanded their freedom, and tendered 15d. which was the usual fine paid for admittance, and prayed to be admitted, but *Stokes* refused them; upon which those six persons declared their votes for *Austin*, and were excluded the Court.

The

The right to the freedom was by birth, by marriage and by fine; and it was allowed that *Geo. Kennet* had a right to his freedom, and though the right of the others was controverted, yet by a verdict found the same day upon a feigned issue in another action it was found that they all had right to their freedom.

[245] After excluding those six the court, they proceeded to the election of a mayor, and there were 24 votes for the defendant *Osborn*, and 20 for the plaintiff *Austin*, besides those six who were excluded, so that if those six were good votes *Austin* was elected, otherwise *Osborn* was elected, and after it was consented that a case should be made, and this matter argued, the Chief Justice delivered his opinion, that those six ought to be reckoned as good votes for *Austin*, and that he was duly elected.

And the Chief Justice said that it was not improper to take notice how *Stokes* became mayor; for the questions here are whether there does not appear in this case such a partiality as to make the election of the defendant void?

Secondly, If the votes of the six ought not to be allowed, by which the election of the plaintiff would be good?

As to the first matter, the election of *Stokes* was not made pursuant to the direction of the charter, and though his election was not void, yet his being elected in such a manner, shews the intention of continuing the office in one party.

As to the other, the six votes excluded ought to be allowed; for it does not appear that there was any doubt of their right to be admitted freemen, but it appears that they were intitled to their freedom; and there did not appear to be any doubt of it on the 2d of Feb. for the mayor does not give that as a ground for refusing them, but said he would do no more business that day; then if they had a right to their freedom, and the court had no doubt of it, if they had done all that was in their power in order to be admitted, the tortious refusal of the mayor does not make their votes void, for admittance is only a ceremony introduced and used for more order and regularity.

The case of a tender and refusal, which amounts to payment, is very apposite to this matter. 1 Inst. 200. Litt. Rep. 33, 34. 3 Salk. 344. 2 Salk. 623. 1 Will. 117.

De Term. S. Trin. 2 Geo. 1.

If a copyholder, to whose use a surrender is made, prays to be admitted in court and is refused, he shall be tenant against the lord, though the lord does lose his fine.

If a man approaches as near as he can to the lands, this amounts to a livery. [246]

And the case here is stronger, for it appears that the corporation had at that time power to perform the ceremony, and there can be no reason why they did not perform it. Litt. sect. 421. Sec. 1 Inst. 48. 52. 2 Blackst. 316.

This is not properly to be considered as between the plaintiff and defendant, but between the persons excluded and the corporation, and then what cause can there be for refusing their votes till admittance?

On the part of the corporation nothing but matter of decency; on the other part it would be manifest injustice if their votes should be rejected; and where the competition is between a defect in point of decency on the one part, and manifest injustice on the other, there can be no question which ought to prevail.

But the Chief Justice, after declaring his opinion, said he would not preclude the defendant from taking the opinion of the Court, and therefore as he was of such opinion he could not in justice permit the defendant to continue in his office, yet he would order that, if upon motion by the defendant in court the first week of the term the court should be of a contrary opinion, the *insignia* of the office which were now by rule delivered to the plaintiff should be redelivered to the defendant; and a rule was made accordingly.

This matter was touched on in Court upon a motion for an information, Trin. 2 Geo. and then Chief Justice PARKER Justice PRATT, and Justice POWIS were of the same opinion which the Chief Justice now delivered, but Judge EYRE was of a contrary opinion.

Mich. 3 Geo. the possession of the office and *insignia* of mayor being resigned to the plaintiff according to the rule, and the Court in Trin. term being of the same opinion with the Chief Justice, the defendant would not be at the charge of arguing this point, but submitted, that judgment should be given against him; and upon such submission the Chief Justice said, that the matter was worthy of being argued; and he should be satisfied to have it argued; but he had considered the case, and was of the same opinion now as he was at the assizes. [247]

Loveday

Case 137 Loveday. *versus* Solomon Mitchell. In C. B.

When the defendant in replevin makes cognisance, and avows, that the property is in himself, it seems to be sufficient without a traverse.

REPLEVIN. The defendant avows the taking of the goods as the goods *ipsius Solomonis*, and concludes with *petit judicium & retorn, &c.* To which the plaintiff demurred, and shewed for cause, that the defendant did not traverse the property of the plaintiff.

Serjeant CHESHIRE urged that he ought to make such traverse; for when the plaintiff had alledged a property in himself, if the defendant afterwards alledges property in himself, or in a stranger that denies the property of the plaintiff only by inference and argument; but he ought to deny the plaintiff's property in direct terms, and so are all the precedents; with this difference, that in some cases the defendant alledges property in himself or another, with a direct traverse; and in some case the plea is, that the property is in the defendant, and not in the plaintiff, which is tantamount to a traverse; for the words *& non* make a traverse. 1 Sand. Serjeant SELBY replied, that the precedents were both ways. *Hern's Plead.* 4. 1 Brown's Ent. Pl. Gen. — Mod. Ent. 300.

[248]

And *per cur'*, It will be good both ways, and there seems to be no difference; for the defendant might have pleaded property in abatement or in bar, and it would have been good without a traverse, and upon that issue should have been joined. And therefore when the defendant makes cognisance, or avows that the property is in the defendant, it seems to be sufficient; for the defendant cannot conclude to the country, but the plaintiff ought to reply, and upon that replication issue shall be joined, and the property of the plaintiff must be proved.

Case 138

Anonymous. In C. B.

If the jury is discharged at the assizes for a view, there is no need of a venire facias de novo.

THE *Postea* returned said, that seven jurors of the principal panel appeared, and five *tales* were added, and then *quod jurator simul cum aliis de circumstan' jurat' ex assensu partium & per mandat' justiciar' jur' præd' a verdicto super exit' præd' dand' certis de causis exonerent' & Alexander Saunders ultimus jur' præd' retrahet'* Afterwards there was a *disfringas* with *decem tales*, for the same jury at the next assizes, and at the next assizes the issue was tried by the same jury.

And

And it was moved in arrest of judgment, that here was a mis-trial, for there ought to have been a *venire fac' de novo*, and not a *distringas* with *Decem Tales*, for the same jury; for by the statute 7 & 8 W. 3. there shall be a *venire de novo*, unless in cases of a view.

Secondly, The jury here were totally discharged, and then there must be a *venire fac' de novo*; for the words are express, that the whole jury shall be discharged, and the subsequent words *quod ult' jur' retrahetur* are impossible, for all were before discharged, and then none of them could be afterwards brought back again.

Thirdly, The entry is upon the latter *postea*, where *Abraham Saunders* is mentioned, not *Alexander Saunders*, and so one was withdrawn who was never sworn.

For which Serjeant CHESHIRE answered, that the cause was sent to a view, and therefore was within the words of the statute.

And tho' the entry be *quod certis de causis* the jury was discharged, and it does not appear by the entry that this was intended for a view; yet this may be explained to the satisfaction of the Court, and need not be mentioned in the entry; for the entry is in the same manner as the entry was before the statute; for it is sufficient to say, *quod certis de causis exonerant*, without mentioning what cause; but here by the *ven' fac'* it appears, that a view was intended at first, for the *venire* says *quod habeat' jur'* (*quod sex vel plur' habeant visum*) by which it appears, that this *ven' fac'* was agreeable to the statute of 4 & 5 Annæ, c. 16. which allows a view before trial; but because only two of the jurors had viewed the premisses, as appears by the return of the sheriff upon the *venire fac'*; it was agreed, that the cause should be sent to a view, as appears by the rule of assize, now made a rule of court. This then being the reason of the withdrawing a juror; and the discharge of the others will be within 7 & 8 W. 3. which allows a *distringas* with *decem tales* in cases of view; and then the entry here *quod ult' jur' retrahetur* shall be transposed, and placed before the words which discharge the jury. [249]

And *per cur'*, If issue is joined, and at the assizes when the issue comes to be tried, and view is consented to, and one juror withdrawn, and the others discharged, for that reason, by the statute 7 & 8 W. 3. there need not be a *venire fac' de novo*, but it is sufficient to have a *distringas* for the

De Term. S. Trin. 2 Geo. 1.

the same jury with *decem tales* at the next assizes. Then when the statute 4 & 5 Annæ, c. 16. allows a view before trial, and directs a *venire fac'* for that purpose, and there be no view had, there may be a view afterwards by consent at the assizes; and if the jury is discharged for that reason, there is no need of a *ven' fac' de novo*. But it is proper that the entry upon the roll should be, that the jury was dismissed for that reason; and as the usage has been otherwise since the statute, that may excuse the omission here; yet the Court ordered, that for the time to come such entry should be made.

As to the other objection, the Court thought the words should be transposed, and construed that a juror was withdrawn, and the rest of the jury dismissed; for if they were all discharged at first, it would be impossible that any of them should be withdrawn afterwards: And for these reasons the exceptions were disallowed by the Court.

[250] Case 139 Johannes Abrahath ver. Johannem Bunn. In C. B.

A misprision of the plaintiff's name instead of the defendant's amendable after verdict without defence.

DEBT upon bond, with condition that the defendant should pay 50l. to one *Eyres*, on such a day, and should indemnify the plaintiff who was bound with the defendant in another bond to *Eyres* for the payment of the same sum.

The defendant pleaded *Solvit ad diem*.

The plaintiff replied, *quod præd' Johannes Bunn non solvit prout idem Johannes Bunn superius allegavit, & hoc petit quod inquirat' per patriam, & præd' Johannes Abrahath similiter*, where it should have been *præd' Johannes Bunn similiter*.

After verdict for the plaintiff, without any defence made by the defendant upon whom the issue lay, it was moved in arrest of judgment by Serjeant SELBY, that they relied on that misprision, and therefore made no defence; and that the statute 17 Car. 2. c. 8. does not extend to this case, for that aids a mistake of the name where plaintiff or defendant has been right named before, only where that might be shewn for cause on a demurrer; but that could not be done here. To which the Court agreed.

Vide stat. 14 Ed. 3. c. 6.
9 Hen. 5, c. 4.
Gilb. Hist. C. B. 110.

But it was amendable by 8 H. 6. ca. 12 and ca. 15. and 32 H. 8. —and for that was cited 1 Roll. Abr. 199. pl. 27. 2 Cro. 502, 587. And of that opinion was the Court, and it was amended.

Piggott

Piggott *versus* Sir Henry Penrice & ux' In Canc'. Case 140

UPON a bill brought for an account of the real and personal estate of —. The case appeared to be this :

The same circumstances ought to be proved to be performed to make a good revocation in equity as at law, unless prevented by the person interested.

[251]

Sir John Spencer died without issue and intestate, by which means his estate descended to his four sisters, *Elizabeth Gore*, mother of the defendant's wife, which *Elizabeth* was dead, and the defendant's wife her heir, *Susanna Nelson*, *Anne Meredith*, and *Alice Piggott*, wife of the now plaintiff. After the death of Sir John Spencer, viz. 9 Feb. 1712. *Sus. Nelson* made and duly executed her will in the presence of three witnesses, and thereby devised in these words, "I make my niece executrix of all my goods, lands and chattels" and died; after her death the plaintiff and *Alice* his wife being seised of one fourth part as parcener, of a third part of *S. Nelson's* share as coheir to her, (for the sisters *Anne* and *Alice*, and the wife of the defendant, being the daughter of *Elizabeth Gore*, the other sister were coheirs to *S. Nelson*, if no estate passed by her will,) levied a fine of the third part of the manor, &c. which was the estate of Sir John Spencer, and by deed declared the uses to the plaintiff and his wife for their lives, remainder to the right heirs of the plaintiff, with a proviso, that the plaintiff and his wife, or the wife alone notwithstanding her coverture, by deed or writing, attested by three witnesses, not being menial servants, might revoke the uses of the inheritance after the life of the plaintiff, and limit new uses. Afterwards *Alice Piggott* being sick wrote a letter, dated 24 Jan. 1713, to Mr. Edwards, who prepared the settlement according to the fine, and desires that he will prepare a deed with speed; that since she hath a power of revocation, and was unwilling the first deed should be made as it is, and used arguments against it, and was dissatisfied in conscience about it, there might be an alteration, till when she should not die satisfied; "for we all know my sister *Nelson's* meaning, and I give the inheritance of that part to my niece *Gore*, who was the daughter of my eldest sister;" and on the back indorses that he should keep it secret.

This letter was sent to Mrs. *Meredith*, with a desire that she would read it, then seal it up; and then it was delivered to Mr. Edwards. About the end of January, Mr. Edwards communicated

Q

[252]

communicated the contents to the plaintiff, and in the beginning of February sent a letter to Mrs. *Piggott*, by which he desired to know, whether she would have the estate limited to her niece and her heirs; if she should die without issue, or under age, if she would not in that case augment her charities, for by the letter she said also, that she would leave 20*l.* *per annum* to augment the poor living of *Offley*, and 10*l.* *per annum* for the poor apprentices. 26 Feb. Mr. *Edwards* wrote another letter to Mrs. *Piggott*, to let her know that the deeds were prepared for the charities, and desired to know who should be the trustees. 10 Mar. Mrs. *Piggott* died, and Mr. *Edwards* in his examination deposed, that when he acquainted Mr. *Piggott* with the contents of the letter he received from his wife, Mr. *Piggott* did not, as he knows, propose any method, or use any means to hinder any revocation or new deed of settlement: and that he received no other orders, and no answer to either of his letters.

It was now insisted upon, that the words, "*I make my niece executrix of all my goods, lands and chattels,*" amounted to a devise of the lands to her, for otherwise the word *lands* would have no signification, for the testatrix was possessed of no leases; and it was urged, that her intention appeared by her declaration to the witnesses, to whom she said, that if she had never so much, the whole should go to her niece, and that Mrs. *Piggott* and Mrs. *Meredith* should not be a groat the better for what she left; and this was confirmed by Mrs. *Piggott's* letter; and though parol declarations shall not be allowed to enlarge the words of a will, yet they may explain words which are otherwise ambiguous. But on the other side it was insisted, that no intention here appeared further than to make her niece executrix; and an heir shall not be disinherited but by express words. That the addition of *goods, lands, and chattels*, is only an enumeration of the particulars which she shall have as executrix; and the word *lands*, being inserted among personal things, shall be construed only of things which she could take as executrix; as in the case of *Wilkinson* versus *Merryweather*, Cro. Car. 447, 449. And if the testatrix had no leases, yet she might intend to have some; or if not, the import of the word may be, that she should have the rents and emblements of the land; as where there is a *levari fac' de terris & catallis*, the sheriff may take the corn upon the ground and other chattels; and a parol declaration shall never be allowed in the exposition of a will.

And

And of this opinion was the master of the Rolls, but would have allowed a trial at law, if Mr. COWPER and Mr. VERNON would desire it, but they did not. [253]

It was then insisted, that this letter of Mrs. *Piggott* amounted to a revocation in equity, for it shewed her intention that there should be a revocation, which seems to have been obstructed by the plaintiff; for Mr. *Edwards* was his agent, and was desired by the letter to be secret; afterwards he communicates it to the plaintiff, and though he depotes that he doth not know that Mr. *Piggott* did propose any method or use any means to hinder, &c. yet the manner of penning his deposition is suspicious: and when he was desired to prepare a deed for the revocation with speed, he did nothing, nor wrote any answer till February, and then desired to know if the estate should be to the defendant and her heirs, when the letter had mentioned that the inheritance should be settled on her niece; and it does not appear whether his letter ever came to Mrs. *Piggott*; but the delay seems to be affected, and Mr. *Piggott* must necessarily be supposed the cause of it. But the master of the rolls would not allow this to be a revocation, for there was no proof that Mr. *Piggott* hindered the execution of the revocation if his wife would execute it, but at the same time he declared that Mr. *Edwards* was culpable; and if it had been proved that Mr. *Piggott* had hindered any body from coming to his wife, or prevented the execution, or obstructed the ingrossing of the deed of revocation, he would have allowed it as a good revocation against him; but this not being proved, the same circumstances ought to be proved to be performed to make it a good revocation in equity, as were requisite to make it a revocation at law, for if all the circumstances of the power are not pursued, it will not be a good revocation in equity or at law; and so it was resolved in the case of *Bath and Mountague*.

Afterwards 19 May, Easter Term following, this cause was heard before Lord Chancellor COWPER upon an appeal, and the former decree affirmed. As to the devise in these words, viz. "*I make my niece executrix of my goods, lands and chattels*," he thought there was no ground in any Court to construe that a devise of the land, or to subject land to the payment of debts; for the will begins with an expression improper for a devise of lands, viz. "*I make my niece executrix*," which has nothing to do but with the personal estate; then when she adds *of all my goods, lands and chattels*, that [254]

that is only an enumeration of the particulars which she shall take as executrix. And the term *lands* is not insignificant, for it imports that she shall take the rents of the lands, but does not amount to a devise of the inheritance of the land, for the law will not permit an heir to be disinherited by implication.

As to the revocation, the letter does not amount to that, for though perhaps her intention was to favour her niece, and there was a delay or neglect in the agent Mr. *Edwards*, with a design to favour his friend Mr. *Piggott*, yet this endeavour of hers without any thing done in pursuance of it, and without pursuing the circumstances of the power, will not amount to a revocation; when a person confines his power to particular circumstances, it is done with a design to prevent his being surprised.

Vide stat.
29 Car. 2,
cap. 3.

If a deed of revocation had been prepared and ready to have been executed, but three witnesses who were not menial servants could not have been got, and this by Mr. *Piggott's* means, perhaps it might under such circumstances have been allowed a revocation.

Term. Sanct. Hill.

3 Geo. 1. In Scacc.

James St. Amand *ver.* Barbara Countess Dowager Case 141
 of Jersey, Administratrix of Edward Earl of
 Jersey, & al'.

A BILL in the Exchequer was brought by the plaintiff on behalf of himself and other bond-creditors of *Edward Earl of Jersey*, against the defendant his administratrix, *William Earl of Jersey*, his son, *Hen. Villers, Esq.* his younger son, an infant, by his guardian and other trustees for the said infant, setting forth, that *Edward Earl of Jersey* was indebted by bond 30 May 1707, to plaintiff in the penalty of 7000*l.* for payment of 3500*l.* and interest, and to *Eliz. Harris*, by bond 20 May 1709, in 400*l.* for payment of 200*l.* and interest, and being (or one *Richard Topham* in trust for him) seised in fee of two fee-farm rents one of 40*l.* 3*s.* 4*d.* the other of 2*l.* 5*s.* 8*d.* subject to 40*l.* annuity to *Rachel Mason* for her life, he and his trustees by lease and release 1 & 2 June 1710, for natural love to the said *H. Villers* convey the said fee-farm rents to his eldest son Lord *Dartmouth* and Lord *Bathurst* and their heirs, in trust, after the death of *Eliz. Mason*, to sell, and the money raised by the sale to dispose of in an annuity or place for his life, and if he died before any sale could be, in trust for himself and his heirs.

A voluntary conveyance had against bond-debts contracted afterwards, in a court of equity.

And after this settlement *Edward Earl of Jersey* becomes indebted to others on bond, and died Sept. 1711. without personal assets sufficient for creditors; and the scope of the bill was, to subject the said fee-farm rents to the bond-creditors in like manner as if they had descended to the heir.

[256]

Mr. VERNON by his opinion 9 Feb. 1716. had declared, Devise of
 that the conveyance being voluntary, and for the benefit of lands, ten
&c. ar
 a child,

fraudulent
against bond
creditors.
Stat. 3 & 4
Will. & Ma-
ry, ca. 14.

a child, will be deemed fraudulent as against bond-creditors; and the statute made for relief of bond-creditors against fraudulent devises goes upon the supposition, that a voluntary conveyance would have been made fraudulent at law, That if there had been no bond-creditors at the time of the conveyance, it might have created a doubt, whether it had been done to defeat bond-creditors; but there being debts then owing by bond, he thought it would be void, even against bond-debts contracted after, or that if it were otherwise, it would come to the same thing, since the estate in question is not sufficient to answer the bond-debts prior to the conveyance; and if necessary, the latter bond-creditors would be admitted to stand in the place of the prior-bond creditors, and the assets so marshalled, that all might receive a satisfaction as far as the assets will extend.

And agreeable to this opinion 22 Feb. 1716, the Court decreed, that the fee-farm rents should be sold for the benefit of the bond-creditors, and that the trustees should all join in any conveyance to be made for that purpose.

D E

Termino Pasch.

3 Geo. 1. In B. R.

[257]

Reeves ver. Trindle alias Trundle.

Ca^e 142

AN APPEAL OF MURDER was brought by the plaintiff, as brother and heir of Gerard Reeves, by writ against William Trundle, returnable in the King's Bench *a die Pasch.* in quind^s dies, and tested 22 Martii; and on the first day of the term, the plaintiff being an infant was admitted by his guardian; and because the sheriff of *Suffex* did not return his writ, nor had the body of the appellee in Court, a rule was granted against him to make a return of his writ, and on the next day, (viz.) the second day of the term, a *habeas corpus* was granted by Rule of Court to have the prisoner *cum causa captⁱ & detentionⁱ* returnable *die Martis prox^o post mens^{em} Pasch.* and upon the day of the return of the *habeas corpus*, the prisoner was brought into Court, and the writ of appeal and *habeas corpus* with the returns to them, were delivered into Court by the sheriff and read; and because the return to the writ of appeal was *paratum habeo*, which referred to the first day of the term when the writ was returnable, though the prisoner was brought into Court upon the *habeas corpus die Martⁱ post mens^{em} Pasch.* the Court directed that the prisoner should be brought to the bar again by rule two days after, and in the mean time the Court would consider whether it would not be proper to return on the writ of appeal, *languidus in prisona*, and to have a *habeas corpus licet languidus* returnable on a day appointed by rule of Court, to bring the prisoner to the bar again; but on consideration it was thought proper that on the writ of appeal the return should be *paratum habeo*, &c. for the whole term is but one day in law, and therefore when the prisoner is brought into Court by the sheriff, that has relation to the day of the return; and though a *habeas corpus* was granted, upon which he was brought into Court, yet that was not any regular process in the action upon which the appellee

Where the Court quashes all Proceedings in a writ of appeal for murder, appellant may be admitted to prosecute his appeal by bill against appellee in cap^o ed^o mar^o

[258]

was

De Term. Pasch. 3 Geo. 1.

was brought into Court, for when he appeared he appeared on the writ of appeal.

And a precedent was cited — *Annæ*, when *HOLT* was Chief Justice, where the proceedings were in the same manner, viz. the writ was returnable the first day of the term, and the prisoner not being then brought into Court, a *habeas corpus* was granted for a day subsequent, and on the return of that, the prisoner came into Court, and the sheriff returned to the writ of appeal *parat' habeo* as here, and then the prisoner was arraigned; and the same manner of proceeding was now approved of by the Court, and the prisoner being brought to the bar was arraigned in *French* on the writ of appeal.

The defendant by his counsel demanded *oyer* of the writ and the return, and had time given him by agreement of the party, to consider of his plea till the last day of the term.

On the last day of the term the prisoner was at the bar, and the appellant and his guardian being called to appear in Court, the prisoner pleaded in abatement of the writ, that his addition of degree or mystery was omitted; and having also demanded *oyer* of the *habeas corpus* and the return demurred to the count, and pleaded over to the felony.

But this seems to be improper, for the *habeas corpus* was not any process in the action, neither had the appellant made any count, for the defendant was only arraigned.

But because there was that misprision in the writ of appeal, in which the appellee was named *William Trindel* alias *Trundel de F. in Com' Kent*, without any addition for his state, degree or mystery, it was prayed that the writ and the proceedings thereon might be quashed, and that the defendant who was before committed to the marshalsea, might be now charged by bill as *in custod' mar' B. R.* for by the statute 1 H. 5. c. 5. in writs original, appeals and indictments, there must be given to the name of the defendant the addition of his state, degree or mystery, and the town or place and county where resident; and if any be outlawed when such addition is omitted, the outlawry shall be void, and the process before outlawry shall be abated on the exception of the party; and therefore where such omission appears to the Court, and the party takes exception for want of such addition, the Court may *ex officio* quash and abate the process where such omission is. And here the Court quashed all proceedings on the writ of appeal by rule.

And

Addition,
where ne-
cessary.
Cro. Jac.
610.
1 Roll. 780.

[259]

No addition
necessary
where pro-
cess of out-
lawry doth
not lie.
1 Salk: 5.

De Term. Pasch. 3 Geo. 1.

And afterwards the appellant was admitted by guardian to prosecute his appeal by bill against the appellee *in custod' mar'*, and the appellee was arraigned in *French per bill*, and the defendant had time allowed him to consider of his plea till the 2d day of the next term, *tunc pro nunc*, for there could be no imparlance.

And this proceeding seems to be warranted by former cases, for an appeal may be pursued by writ or by bill in the King's Bench. Stanf. Pl. Co. 646. b.. H. P. C. 179. 2 Inst. 420. Stat. 3 H. 7. And therefore if it be commenced by writ, but the proceedings on the writ are annulled within a year, and the party be in the custody of the marshal of the King's Bench, the appellant may afterwards proceed against him by bill; and so was the case between Watts and Brains, where the appeal was by writ directed to the warden of the Cinque Ports, returnable in the King's Bench, against the appellee, for a murder committed in the Cinque Ports, and therefore it was directed to the warden, and not to the sheriff; the writ was quashed, and the appellant prosecuted the appellee by bill, as in the custody of the marshal; upon which bill he was tried and hanged. Cro. Eliz. 6. Yelv. 13. Co. Ent. 59. So where an appellee was arraigned upon bill before the Justices of gaol-delivery and removed here, the same proceeding being irregular were quashed, and the prisoner was arraigned *de novo* by bill *in custod' mar'*, Pasch. 8 Annæ, B. R. Smith versus Bowen, vide Armstrong versus Lisle, 1 Salk. 60. and though it was denied when there was a declaration against the appellee before the Justices of gaol-delivery, yet then it was agreed it might have been so, if they had not declared. 2 Roll. 478. So in Holland's case, Cro. Eliz. 605. where it was denied, it was chiefly insisted on as the reason, for that the appellee was not in the custody of the marshal, and if there is not a declaration by bill against him cannot be.

Cases B. R. 108. 109. 157. Holt 63. 1 Roll. abr. 581. Skinn. 634. 2 Hawk. 232. 1 Ec. abr. 123, 128. 2 Ld. Raym. 1290. 1 Salk. 64.

Manner of pursuing an appeal. 2 Hawk. 232. Cro. Eliz. 605. 695. Skinn. 634. Summary 179. 17 Affize 5. 17 Ed. 3. 13. 4 Inst. 180. 1 Bull. 74. An appeal may be commenced before Justices in Eyre. 2 Hawk. P. C. 233. [260] Kelw. 152. 2 Inst. 418. 420. Jones 425. 1 Roll. abr. 536. 2 Roll. abr. 596. 4 Inst. 557. Skinn. 670. Comb. 410. Kely. 89. 93. Carth. 394. Hawk. 232.

Huffey versus Huffey & al'. In C. B.

Case 143

QUARE IMPEDIT against John Huffey and John Bagwell, clerk for the church of D. in Devonshire: The defendant Bagwell pleaded in abatement, that in the county of Devon, there were two persons named John Bagwell, sen. clerk, it says that

Plea in abatement held bad and repugnant, where it says that

there are
two persons
in com' Devon
of the
same name
without distinction.

clerk, and *John Bagwell*, jun. clerk, and that there is no distinction made; and by the affidavit according to 4 & 5 Ann. c. 16. *John Bagwell* of *A.* in the county of *Cornwall*, clerk, maketh oath that he hath a son *John Bagwell* of *D.* clerk, &c.

And it was now moved, that this plea should be rejected as frivolous, for by the statute 4 & 5 Ann. 16. dilatory pleas shall not be received in any Court of Record, unless the defendant by affidavit shew the truth thereof, or shew some probable matter to the Court to induce them to believe that the fact of such plea is true; here the fact of the plea is, that there are two persons in the county of *Devon* named *John Bagwell*, clerks, but the affidavit only says, that *John Bagwell*, clerk, hath a son named *John Bagwell*, clerk, but the father is named of *A.* in the county of *Cornwall*, and it does not appear that he was of *Devonshire*, but only that the son is there.

[261]

Ante 259.

Secondly, This plea is not pleadable in this action, for there need not be a distinction of names but in actions where process of outlawry lies, or in assise where an attachment goes against the defendant, and the recognitors appear the first day of the return of the writ, and the defendant, who pleads that there is no distinction of the name given him, pleads also to the assise, and therefore there is no delay.

But where the action gives such a description of the defendant as distinguishes him from all others of the same name, there is no need of any distinction of senior or junior, as in debt upon a bond; for the defendant is distinguished by the execution of the deed, and if he did not execute it, he may plead *non est factum*. R. 9 H. 7. 21. b.

So in dower, or *præcipe quod reddat*, there is no need of the distinction, for the summons must be of the tenant of the land, and if another be summoned he may disclaim. L. 5 Ed. 4. 25. a.

So here the summons is only against the disturber or clerk instituted to the church, and if he be not truly summoned, the judgment upon the grand distress will be avoided. Searle ver. Long, Mod. Rep. 248. If he be summoned he receives no prejudice, and he is sufficiently described by his being the disturber.

So there is no need of any distinction when the defendant himself appears, as here. 39 H. 6. 46. 27 H. 8. 1.

But upon this matter the Court gave no opinion, but for want of a proper affidavit the plea was rejected; and the CHIEF JUSTICE said that the plea was in another respect repugnant, because it says, two persons in the county of *Devon* were named *John Bagwell* sen. and *John Bagwell* jun.

N. B. There

N. B. There is no need of any distinction but where [262]
there is father and son of the same name. 44 Ed. 3. 34. b.
33 H. 6. 33, 34. 39 H. 6. 46. a.

Anonymous.

Case 144

ACTION for words, (viz.) "*I never forged any man's hand, but you are a forging rogue.*"

Words,
"That I
never forg-
ed any mans
hand, but
you are a
forging
rogue,"
when spoke
of an attor-
ney, held
actionable.

And it was moved in arrest of judgment, that the words were not actionable though spoke of an attorney, and a verdict found for the plaintiff.

For to say *you have forged my hand* without any thing more is not actionable; by Gawdy and Wray, 2 Leon. 231. So if a man says you are a forger, without saying what you forged.

And in all cases where the words do not shew an accusation for such a forgery, that an indictment or information might be maintained thereon if the words were true, an action will not lie.

And here when it is said, *I never forged any man's hand*, admitting it to be tantamount to saying *you forged a man's hand*, yet it does not appear that he forged it to any writing for which an indictment or information would be maintainable, and an indictment for forging a man's hand without any thing more is not maintainable.

If then the words are not of themselves actionable, neither will they be actionable though spoke of an attorney, for there is no *colloquium* concerning his profession alledged, and therefore Hob. 305. Powel versus Wynde, these words spoken of an attorney are not actionable, (viz.) Mr. H. hath found forgery against him, and can prove it, for no certainty appears of what this forgery was.

But it was resolved by the whole Court, that the words were actionable, for by the common intendment of the hearers it would be taken as a great reproach and defamation, to say of one who was an attorney that he forged another man's hand, and therefore is a forging rogue; and this is the import of the present words, for when the defendant says "*I never forged any mans's hand, but you are a forging rogue,*" the antithesis by common intendment and in the apprehension of the hearers amounts to a charge that the plaintiff did what he denied of himself, and these words spoken of another import scandal and defamation on him; and the plaintiff had his judgment.

[263]

Term. Sanct. Mich.

4 Geo. 1. In C. B.

Case 145

Field *ver.* Workhouse. In C. B.

Sheriff cannot take bail-bond upon an attachment for a contempt. Cro. Eliz. 460, 624, 625, 672. 707, 745, 808, 855, 875.

1 Sid. 439, Mod. Rep. 228, 10 Co. 101, a.

2 Jones 76, 1 Salk. 99, 2 Salk. 496, 608.

2 Saund. 60, 1 Mod. 244, 2 Mod. 63, 177, Ld. Raym. 425, 722, 904, 1564, 1574, Aute 132, Gilb. Rep. 84, 4 Bac. Abr. 463, Strange, 479, 882, 1 P. Will. 687, 10 Mod. 283, 1 Term. Rep. 418, 2 Term. Rep. 569.

DEBT upon bond. The defendant pleaded Stat. 23 H. 6. c. 10. which makes all bonds, &c. taken by a sheriff *colore officii* void, and said, that an attachment issued out of this Court against A. for a contempt, and upon that the sheriff took this bond from the defendant *colore officii* for the appearance of A. To this the plaintiff demurred.

And the question was, whether the sheriff could take a bail-bond upon an attachment for a contempt? And it was resolved that he could not; and KING Chief Justice delivered the opinion of the Court, and said, that upon an attachment of privilege, attachment upon a prohibition, attachment in process upon a penal statute, the sheriff might take bail; but not upon an attachment for a contempt, for that is not within the words or the intent of the statute.

Judgment for defendant.

[265]

Case 146

Powell *ver.* Bull & al.' In C. B.

The word *Tenement*, mentioned in 9 & 10 W. 3. for the workhouse corporation of Colchester, extends to a rectory.

IN an action of trespass, upon not guilty pleaded, a case was stated before Lord Chief Justice KING, at the assizes at *Chelmsford*, in *Essex*, and afterwards argued in Court, by which it was stated, that the plaintiff was rector of *St. Botolph's* in *Colchester*, That by the statute 9 & 10 W. 3. intitled, *An act for erecting hospitals and workhouses within the town of Colchester, in the county of Essex, for the better maintaining the poor thereof*, it was enacted, That after 24 June 1698, there shall be a corporation in the town of *Colchester*, consisting of the mayor and aldermen, and

forty.

forty-eight other persons to be chosen out of the four wards in the town, viz. twelve out of each ward, by votes of inhabitants paying or rated at 1d. *per* week, or more, towards the poors rates, according to the usual way of rating in the said town. That they shall hold courts or assemblies on the second *Tuesday* of every second month, for the ends in the said act mentioned. That the corporation at every such Court may make rules, &c. for the governing the said Corporation and the poor of the said town, to erect hospitals, workhouses, to provide necessaries to set on work the poor, &c. send to the house of correction, &c. put out apprentices, &c. That for the better carrying on so charitable a work, the said courts may ascertain what sum is needful for the maintenance and imployment of the poor, so as it does not exceed what was paid to the poor in any of the three last years; and so as to the poor of all the parishes in the said town unable to work be provided for thereout, to the intent no other levy or assessment be made for the poor of the said town; and may proportion out, rate and assess the said sum or sums of money on the respective inhabitants or occupiers of lands, houses, tenements, tithes impropriate, appropriation of tithes, and all persons using stocks and personal estates in the said town or liberty of the same, in equal proportion, according to their respective value, to be levied by distress and sale, &c.

That the plaintiff was assessed according to the said statute for his tithes, parcel of the said rectory, and that by a warrant, &c. the defendant took the goods in the declaration for such said assessment; and if the tithes, parcel of the said rectory, might be assessed, was the question.

[266]

And it was agreed, that an ecclesiastical person was bound by acts of parliament, if the words extend to him, and therefore he is chargeable by 43 Eliz. c. 2. as an inhabitant; for the statute says, Every inhabitant, parson, vicar, or other, &c. So to send his teams to the highway. 1 Vent. 273. 2 Lev. 139. Lut. 1563. So in 2 Inst. it was agreed that an ecclesiastical person would be within 27 H. 8. 24. by which it was enacted, that purveyors might provide victuals, &c. within liberties, or without, if he had not been within the proviso of the same statute, viz. Provided that the statute in such cases provided be observed; and therefore ecclesiastical persons being exempt from a purveyance by Mag. Charta, 9 H. 3. 21. and other acts, are within the proviso, otherwise they would have been liable

to

to the purveyors, 2 Inst. 3. And the sole matter insisted on was, that tithes were not liable to be assessed within any words of this act; and it was insisted, that the plaintiff could not be charged to the poors rate of *Colchester*, if he was not within the words of this new act, though he was chargeable by the statute 43 El. c. 2. in which he was expressly named; but by the words of this act the plaintiff was not rateable to the poor for his tithes; perhaps, as inhabitant, he might be assessed for his personal estate; but this act, being introductive of a new law, shall be taken strictly, and therefore if the words do not expressly describe him, they shall not be extended to him. A parson was not chargeable to temporal charges by the common law; and therefore an act of parliament, if the words and intent are not plain and manifest, shall not extend to charge him; but this act only charges the occupiers of lands, houses, tenements, tithes impropriate, and appropriation of tithes; the plaintiff cannot be charged as an occupier of tithes impropriate, for these words mean only the patentees of the King, where tithes are in lay persons; and appropriation of tithes was where tithes were appropriated to a religious house; or perhaps a portion of tithes in another parish, which belonged to the parson of *St. Botolph's*, might be assessed in that parish, from whence the portion of the tithes issued or arose, but could not be charged here in the parish of *St. Botolph*; to which the Court agreed. Then the words *houses and lands* do not extend to tithes, nor the word *tenement*, which import only what may be held by some service.

[267]

Co. Lit.
19, 154.

To which it was answered and resolved by the whole Court, that the word *tenement* extends to a rectory, for that may be held in *Frankalmoine*, and the word *tenement* extends not only to that which may be held by some service, but comprehends all that a man may be seised of *ut de libero tenemento*. Co. Lit. 6. a. and that a rector has the frank-tenement of his rectory appears by Co. Lit. Sect. 647.

Judgment for defendant.

Case 147 *Upton and Pinfold & ux.* In C. B. Intr. Trin.
5 Geo. Rot. 850.

An allegation in an action for words, that

IN an action upon the case for words, the plaintiff declared that the wife of the defendant 20 Sept. 3 Geo. 1. *ca-dem*

dem *Jana* *adtunc* & *ibidem* *colloquium* *haben* *cum* *quodam* *Johanne* *Austin* *servo* *quer* *dixit* *de* *quer* *verba* *sequen* ; you (*præd* *Austin* *innuendo*) are a great rogue and rascal, as great a rogue as your master (*præd* *quer* *Magist* *dict* *Johan* *Austin* *adtunc* *existen* *innuendo*) who (*præd* *quer* *innuendo*) is a rogue, for that your master and dame (*præd* *quer* & *A. uxor* *ejus* *magistrum* & *magistram* *ipsius* *Johan* *Austin* *innuendo*) stole rugs and quilts. Upon demurrer to the declaration it was objected,

præd *Jana* *adtunc* & *ibidem* *colloquium* *habens* *cum* *servo* *quer*, is sufficient, for the *adtunc* refers to the whole clause.

First, That those words *non constat de persona*, for the *colloquium* is alledged with *John Austin*, *servo* *quer*, and perhaps he was his servant at the time of the declaration, but it does not appear that he was his servant at the time of the discourse ; for it it not said *adtunc* *servo*, and then the *innuendo* *quer* *adtunc* *magist* is not sufficient, for an *innuendo* may explain, but can never enlarge the words.

[268]

Secondly, *De quer* is not a sufficient allegation (without alledging a *colloquium de quer*) that the words were intended of him ; and therefore in an action for words alledged to be spoken of a plaintiff to a wife, viz. *Thy husband and his master* (*innuendo* the plaintiff *stole my wood*, it was resolved it was not maintainable without an express averment, that the plaintiff was master or husband. 1 Roll. 62, 80. pl. 4. 2 Bul. 81. Mo. 63. Dal. 66. So if words were spoke to a father or mother of a plaintiff, *Thy son* (*innuendo* the plaintiff) *stole*, &c. 2 Cro. 635. 1 Roll. 84. pl. 4. Cro. Car. 442. *per Croke* and *Whitlock*, Cro. Car. 177. and there two judgments cited by *Croke* accordingly ; but *Hyde C. J.* and *Jones* doubted, and therefore it was adjourned. So if *colloquium de quer* was added, it was doubted of, Cro. Car. 420. 1 Rol. 84. pl. 1. So where the words were, *Thy father* (*innuendo* the plaintiff) if it does not appear that the son was present (though a conversation concerning the father is alledged.) 1 Rol. 84. pl. 9. *Sed non allocatur* ; for the allegation, *Præd* *Jana* *adtunc* & *ibidem* *colloquium habente eum* *Johanne* *Austin* *servo* *quer* is sufficient ; for the *adtunc* refers to the whole clause, and imports, that he was then his servant when the discourse was between them.

Thirdly, It was objected, that here the words themselves are uncertain ; for it does not charge him directly with felony, but it is only given as a reason why she called him rogue, for that he *stole*, &c. and does not say *they were the goods of a stranger*. So the words, *You are as bad as thy wife when sh^e stole my cushion*, were adjudged not actionable, Words spoken must be certain and taken together. 4 Rep. 17. 1 Cro. 127. Moor 174, 331.

De Term. S. Mich. 4 Geo 1.

Vide 2 Bul. 127. ble, without an averment that the felony was committed. 2 Cro. 331. 1 Rol. 78. pl. 1. *Sed non allocatur*; for there the words were *when she stole*, and without an averment that the goods were taken away there does not appear to be any charge; and therefore judgment for the plaintiff.

[269]
Case 148

Parry *ver.* Berry. In C. B.

A bye-law
to restrain
persons
from exer-
cising a
trade, not
being free
of a bo-
rough, held
void.

TRESPASS. The defendant pleads, that by letters-patent of 1 Jac. 1. the inhabitants of *Chippen-Camden* were incorporated by the name of the bailiffs and burgesses; that there were 12 capital burgesses and 12 common burgesses, and that the bailiff and capital burgesses had power to make bye-laws; that the 8th of March 1 Jac. 1. the bailiffs and burgesses made a bye-law, that no person inhabiting out of the borough, or not free of the borough, should set forth goods to sale, except victuals on market-days, in any market within the borough, &c. that the plaintiff not being free of the borough kept a shop and set forth goods, not being victuals, in the market of the borough on a market day; and therefore, for the penalty of the bye-law the defendant, being an officer within the borough, took the plaintiff's goods in the declaration mentioned. Upon demurrer it was resolved, that this bye-law was void; for without a custom such a by-law, to restrain persons not being free of the borough from exercising a trade, cannot be maintained; and it was so ruled in *Norris versus Staper*, Hob. 211. Mod. 869. Hutt. 5. Noy 19. 1 Brownl. 49. 1 Ro. Rep. in *Waggoner's case*. 8 Co. 125. 2 Roll. 202. Cart. 68, 114. and therefore this bye-law by a corporation is void. But this exceeds all bye-laws made in *London* or elsewhere, for it not only excludes persons from using their trade within the borough, but also from resorting to the market.

Secondly, It was made by the bailiffs and all the burgesses, where it ought to be by the capital burgesses only.

Judgment for the plaintiff.

Saunders,

Saunders, qui tam, *ver.* Stevens. In C. B.

[270]
Case 149

DEBT for 200l. The plaintiff declared, that by the statute 1 Geo. — intitled, *An Act for rectifying mistakes in the names of the Commissioners of the Land Tax for the year 1714.* &c. the several persons after named were authorised to put in execution the act made in 12 Anne, for granting an aid, &c. by a land-tax for the service of the year 1714. as Commissioners for the land-tax, in the same manner as if enabled or named Commissioners by the said act, being nevertheless subject and liable to the qualifications and penalties in the said act appointed and required.

A term for years held a qualification for a commissioner of the land-tax.

That by the said act 1 Geo. the defendant was named a Commissioner for the county of *Surry*; that by the statute 12 Annæ, fo. 156, it was provided and enacted, that no person shall be capable of acting as a Commissioner in the execution of this act in or for any county at large within *England or Wales (Merioneth, Carmarthen, Glamorgan, Montgomery, Pembroke and Monmouth excepted)* in or for any of the ridings of the county of *York*, unless such persons be seised of lands, tenements or hereditaments which were taxed or did pay in the same county or riding for the value of 100l. *per annum*, or more, of his own estate, by virtue of a preceding act 12 Annæ, for granting an aid, &c. for the year 1713.

That the defendant acted as Commissioner for the county of *Surry*, by signing duplicates, &c. not having lands or tenements which were taxed to the value of 100l. *per annum de proprio statu*, according to the precedent statute of 12 Annæ, for the service of the year 1713.

After *nil debet* pleaded at the trial it appeared upon the evidence, that the defendant had not lands of freehold more than 10l. *per annum*, but was possessed of lands of 100l. *per annum* for the remainder of a term of thirty years, which were taxed to the value of 100l. *per annum*, the precedent year; if he was qualified to be a Commissioner was the question; and if he was not, whether this action was discharged by the act of general pardon 3 Geo.

[271]

And as to the first question it was urged; that this statute requires that every one who acts as a Commissioner should be seised of lands or tenements of 100l. *per annum*; therefore a term for years does not make a good qualification,

R

the

De Term. S. Mich. 4 Geo. 1.

the word *seised* imports a freehold at least; and he who has but a term for years is not said to be seised of it, but only possessed. Co. Lit. 17. And therefore, where the statute of 27 H. 8. c. 10, saith, that where any person, &c. stands or is seised, or shall hereafter be seised of any lands, tenements or other hereditaments, to the use, confidence or trust of another, &c. the person who hath the use shall be deemed to be in the seisin or possession of the same lands and of the same estate which he had in the use.

If a term of years be assigned to A. to the use of B. this shall be a trust for B. and not an use executed; for A. is not seised, and therefore it cannot be an execution of an use by the force of the statute 27 H. 8. and so it was resolved by all the justices, Dyer 369. a. which is cited and allowed Mo. 614. So where by the statute 8 H. 6. c. 9. it is enacted, that, upon complaint of any forcible entry or detainer, the justices of the peace shall cause to be resealed the lands so entered upon or holden.

If a Termor be ousted, he is not within the statute 8 H. 6. for a justice of peace cannot cause him to be resealed who never was seised, Mo. 614. and therefore a remedy was given for copyholders and lessees, &c. by 21 Jac. 1. c. 15.

But in Mich. 4 Geo. 1. the Court gave judgment unanimously for the defendant; and held, that he had a sufficient qualification to act as a commissioner; but they also held, that supposing him not qualified, the general act of pardon would not have excused him.

[272]

Case 150

Walker *ver.* Holyday. In C. B.

Where tenant in common declares against another as receiver it ought to be shewn by whose hands he receives it, otherwise he ought to be charged as bailiff.

AN ACTION of account was brought against the defendant as bailiff, and also as receiver for the eighth part of the profits of lands which the plaintiff and defendant and others held in common, and which the defendant had received, and for so much money which the defendant had received to his use. As to the account against him as bailiff, the defendant entered into the account; as to the account against him as receiver, the defendant demurred, and shewed cause, that the plaintiff did not say by whose hands he received it.

It was urged, that this exception was now taken away by 4 & 5 Annæ, c. 16. by which one jointenant or tenant

De Term. S. Mich. 4 Geo. 1.

in common may have an account against the other for receiving more than comes to his proportion, &c. and therefore when it appears here by the declaration, that the plaintiff and defendants are tenants in common, it is sufficient, without saying by whose hands the profits were received. *Sed non allocatur*; for *per cur'* by the statute one jointenant or tenant in common cannot charge the other but as bailiff; for by the common law an action of account lay not by one tenant in common against his companion, but where there was an express authority given to take his part of the profits, and then he was chargeable as bailiff, but now by this statute he may be charged. If he receives his companion's share of the profits, though it be without his privity, yet he ought to be charged as bailiff by the express words of the statute, and cannot be charged as receiver; and therefore, as the declaration charges him as bailiff, and also as receiver in declaring against him as receiver, it ought to be shewn by whose hands he received it, as it ought by the common law; and this being assigned for cause of demurrer, judgment was given for the defendant.

1 Inst. 188.

R 2

D E

Termino Pasch.

4 Geo. 1. In C. B.

Case 151-

Anonymous.

In an action founded upon an injury, every thing that shews that the defendant did what he lawfully might do, may be given in evidence upon not guilty.

IN an action upon the case, by which the plaintiff declared that he was seised in fee of an ancient messuage in *London*, in which there had been time out of mind an ancient light, and that the defendant by erecting a new house contiguous to it, had stopped up the same to his damage, &c.

The defendant pleaded not guilty, and upon the trial before KING C. J. at the sittings after last term it was given in evidence, That by the custom of *London* every citizen upon an ancient foundation may build a house as high as he pleases; that the defendant had an ancient house contiguous to the plaintiff's house, and rebuilt it upon the ancient foundation and of the same dimensions, and that he stopped up the plaintiff's window, which before was higher than the defendant's house; whereupon the defendant had a verdict.

And Serjeant DARNEL moved for a new trial.

First, Because the custom is not good.

Secondly, If the custom be good, it ought not to be given in evidence upon not guilty.

274]

As to the custom he insisted, that it was unreasonable by a new building to stop another person's window, for which there cannot be any good reason given, and although such custom be mentioned by *Calthrop*, yet the reasons there given for it are weak. *Sed non allocatur*. For the custom there was not disallowed, and it was upon good reasons, for by the common law every one may make what erection he pleases upon his own soil; then if one builds an house upon his own soil, another may erect a messuage upon his soil adjoining to it, and stop all his windows which are towards

De Term. Pasch. 4 Geo. 1.

wards his soil. 1 Syd. And in a city where there are divers ancient messuages it is reasonable that if one raises his house higher than his neighbours, that the other may at any time afterwards raise his house as high as he pleases, and the advantage or disadvantage is equal to one as the other; then as to the pleading of such general custom, the Chief Justice said that evidence upon the general issue had of late been allowed in many cases, which in former times would not have been admitted, and therefore in an action upon the case, which is founded upon an injury done by the defendant to the plaintiff's damage, every thing which shews that the defendant did what he lawfully might do, may be given in evidence upon not guilty pleaded; for that proves that he had done no injury; and a new trial was denied for these reasons.

Marriott *versus* Shaw & al' Intr. Mich. 4 Geo. Case 152
Rot. 400. or 343.

REPLEVIN was brought by John and Richard Marriott, *quare ceperunt bona & catalla ipsor' Richardi & Johannis viz. unum dolium piperis Jamaici, quatuor al' Dolia & un' al' parcell' sebi ad valent', &c. apud Mansfield, &c.* The defendant Rowland Shaw, *ut constabularius de Mansfield in com' Nott' præd' bene advocat,* and the other defendants *ut servien' ipsius Rowlandi bene cogn' &c. quia dicit quod 17* [275] *Oct' 2 Geo. apud Mansfield præd' William Toone ven' coram J. Digby ar' un' just' domini regis ad pacem, &c. in com' præd' & dedit information' præfat' just' quod præd' Richardus Marriott tallow-chandler infra tres menses ult' viz. 15 Oct. 2 Geo. ad tunc existens persona per leges Angliæ minime qualificat' seu allocat' ad custodiend' aliquem canem leporar' ad occidend' & destruend' feras, &c. apud E. in Com' præd' un' canem lepor' ad occidend' & destruend' feras, & apud C. in com' præd' un' al' canem leporar' ad occidendum & destruendum feras illicite custodivit contr' form' stat' in hujusmodi casu edit' & provis', quodq' præd' Richardus Marriott apud E. & C. præd' eodem 15 die Oct. usus fuit canibus præd' & cum eisdem canibus un' leporem apud E. præd' & duos lepores apud C. præd' eodem 15 Oct. illicite interfecit contr' form' stat' in hujusmodi casu edit' & provis', & superinde postea, viz. præd' 17 Oct' 2 Geo. quidam C. Palmer & C. D. existen' testes credibiles, &c. deposuer' quod præd' R. Marriott 15 Oct. tunc existens persona minime*

A conviction per præmissus for three penalties of five pounds each, for killing three hares, where it appears it was done the same time, is bad, for the statute does not give five pounds for every hare, it being but one offence.

De Term. Pasch. 4 Geo. 1.

minime qualificat' un' canem lepor' apud E. & un' al' canem lepor' apud C. illicite custodivit contra form' stat, quodq' præd' R. Marriott dicto 15 die Oct. un' leporem apud E præd' & duos lepores apud C. præd' illicite interfecit, &c. super quo præd' R. Marriott post summonitionem, &c. coram præfat' just' comperuit, &c. & quia, &c. præfat' just' constitit quod' præfat' R. Marriott fuit culpabilis, &c. ideo cons' quod' præd' R. Marriott convict' est de præmissis, &c. record' cujus convictionis dominus rex in cur' domini regis coram ipso rege nuper certis de causis mitti fecit, prout per record' ill', &c.

And the defendants ulterius dicunt quod 7 Jan. 2 Geo. præd' J. Digby, tunc just', &c. de & super præmiss' fecit quoddam warrant' in script' constabular' de Mansfield direct' ad levand' de bonis & catallis præd' R. Marriott 25l. per ipsum ut præfert' forisfact', virtute cujus warranti 9 Jan' 2 Geo. præd' Rolandus Shaw tunc constabular' & præd' Chr' & Jos' ad requisition' & in auxilium præd' Rowlandi ceper' bona & catalla, &c. ad levand' de medietate præd' R. Marriott 15l. de præd' 25l. pro tribus offensis, viz. interfectione trium leporum præd', de præd' quinque offensis unde præd' R. Marriott convict' fuit.

[276]

The plaintiff in bar to the avowry says, quod dicto 15 Oct. & ante & continue postea, &c. idem R. Marriott seisis' fuit, &c. ut de feodo in suo proprio jure de & in terris & tenementis in D. in com' præd' clari annus valoris 100l. per annum & ultra, ac eâ ratione tempore quo &c. fuit persona per leges hujus regni qualificat', &c. unde præd' J. Digby ante conviction' præd', &c. notitiam habuit, & quod convictio illa omnino vacua in lege exist', & hoc, &c.

The defendants in reply dicunt quod præd' J. Digby non habuit notitiam, &c.

To which it was demurred; because the defendants traverse a matter not alledged, not traversable, not triable.

The defendants join in demurrer.

It was argued by Serjeant PENGELLY for the plaintiff, and Serjeant CHESHYRE for the defendants.

And it was insisted for the plaintiff, first, That the defendants ought to justify, and not avow, for Rowland Shaw took the goods but as an officer, and had not any interest in them. 1 Roll. 319. S. 4. 318. L. 45. 320. L. 5. 2 Cro. 436.

To which it was answered, that in the cases cited the defendant could not avow or justify, at his election; but if he

he justifies, he shall not have a return; so resolved 3 Lev. 204. And this seems to be but form, which shall be aided upon a general demurrer; as if a defendant avows, where he ought to make conusance, it is but form. 2 Cro. 372. And here an avowry seems more proper; for the defendant ought to levy by distress and sale, and therefore ought to have a return, that he may sell.

But as to this point the Court determined nothing.

Secondly, That after the conviction shewn the defendant saith, *Record' cujus conviction' rex nuper cert' de causis coram just' de B. R. mitti fecit*, whereby the conviction was suspended. To which it was answered, that the conviction was 19 Oct. 2 Geo. the warrant upon it 7 Jan. 2 Geo. [277] and the declaration was Mich. 4 Geo. then when the defendant says, *nuper mitti facit*, this refers to the time of the plea, not to the time between the warrant and conviction, which was two years before; but by 5 Ann. 14. a certiorari does not restrain execution but where security is not given for payment of costs.

Thirdly, That the conviction does not shew five offences, yet the warrant says, that he shall pay 25l. and thereupon the defendant levied 15l. *de præd' 25l* for three offences *de offens' præd' viz. pro interfection' trium leporem præd'*. To which it was answered, That the conviction says, that the justice was informed, and the witnesses deposed *quod R. Marriott 15 Oct. 2 Geo. apud E. custodivit canem leporar' ad occidend' & destruend' feras, quod custodivit apud C. un' al' canem leporar' ad occidend', &c. contra form' stat', quod eodem 15 Oct' usus fuit canibus præd' occidet un' leporem apud E. præd' & duos al' lepores apud C. contra form' stat'*. Then the warrant commands that they levy 25l. *sic ut præfer' forisfacti*, and the defendant levied 15l. *de præd' 25l. pro tribus offens' de offens' præd, viz. pro interfection' præd' trium leporum*; and therefore the conviction has determined that there are five offences, and then the constable may levy for any of the offences; for tho' all the offences are comprised in the same conviction, it shall be a several conviction for every offence, and the officer may levy for a part, *tho' not for all*; and if the Justice had determined these to be five several offences, tho' they are not, this is error in the justice; but the officer shall not be liable for the mistake of the justice, where the thing is within his jurisdiction.

Fourthly, That the plaintiffs are partners, and the defendant took the goods of both of them.

De Term. Pasch. 4 Geo. 1.

To which it was answered, that he must take the goods of both to levy out the moiety of one partner. 1 Salk. 392. Show. 173.

[278]

As to the matter of law it was insisted, that the plaintiff in bar to the avowry says, that he had 100*l. per annum* at the time of the offence and conviction, and for that reason was qualified, &c. of which the justice had notice; and if he was qualified, which is now admitted by the demurrer, then the justice had no jurisdiction of the subject matter; and if the thing be out of his jurisdiction, the officer shall not be excused, for all the proceeding is null and void, & *co-ram non iudice*.

To which it was answered, that here it was alledged in the conviction, *quod fuit persona minime qualificat'*, and then if he does not alledge his qualification, and insist upon it at the time of the conviction, or when he appeared before the justice, he shall not plead it afterwards to maintain his action against the constable.

If a cause in an inferior court be alledged *infra jurisdiction cur'* though it be out of the jurisdiction, if the defendant does not plead to the jurisdiction he shall not have a prohibition afterwards. 1 Vent. 88, 181. 1 Sid. 464. Raym. 189. 2 Mod. 271. Nor can it be alledged for error in fact. 1 Vent. 236. Nor shall he have an action upon the statute of W. 1. 35. 2 Inst. 230. So trespass lies not against the officer, resolved 2 Mod. 58. 196, though plaintiff pleads, that the cause of action arose out of the jurisdiction. Lut. 935. 1 Salk, 281. But escape lies against an officer, though he knew the matter arose out of the jurisdiction. 7 Ann. C. B. *Higginson versus Sheif*.

Cowp. 640. But afterwards the Court gave judgment for the plaintiff upon the third objection, without determining the matter of law; for that by the conviction there is not any number of offences alledged, for he is convicted *super præmissis*, and it appears that it was only one offence; for the statute does not give 5*l.* for every hare, and all was done the same day, and so was only one offence.

Phillips

Phillips *versus* Smith. In the Exchequer Chamber, Case 153
11 May, 3 Geo.

A WRIT OF ERROR was brought in the Exchequer Chamber upon the statute 27 Eliz. on a judgment in B. R. Trin. 2 Geo. Rot. 465. in an action of debt, in which the plaintiff declared against the defendant

Tender, that the plaintiff was ready to pay what was due for the copy of a poll, till the officer demands something certain, held a good tender.

“Ballivum burgi de Ivelchester in com’ Somerset pro eo, videlicet, quod cum villa de Ivelchester est antiqu’ burgu’, quodque duo burgenses ejusdem burgi ad quodlibet parliament’ domini regis & antecessor’ suor’ regum & reginar’ Angl’ ad veniend’ a tempore cujus, &c. electi fuer’ ac eligi consuever’ per burgen’ & inhabitant’ ejusdem burgi en eâ parte voces & suffragia haben’, cumque quoddam breve domini regis nunc extra conc’ suam apud West’ in com’ Midd’ 17 die Jan’ anno regni qui primo, gerens dat eisdem die & anno, emanâset vic’ Som. direct’ per quod, &c. prout breve, &c. quod quidem breve postea, scilicet, 26 Jan’ primo Geo. apud Ivelchester præd’ deliberat’ fuit cui-dam J. T. adtunc vic. Som’ præd’ existen’ in formâ juris exequend’, virtute cujus brevis idem vic’ postea, scilicet, dicto 26 Jan’ primo Geo. ibidem fecit quoddam præcept’ suum in script’ sigillo officii sui vic’ sigillat’ ballivo dicti burgi de Ivelchester in com’ præd’ direct’, de & pro election’ infra burg’ ill’ duor, burgen’ burgi præd’ secundum formam & effect’ præd’ brevis, quod quidem præcept’ postea, scilicet, dicto 26 Jan’ primo Geo. apud Ivelchester præd’ deliberat’ fuit præfat’ Tho. Smith tunc ballivo burgi ill’ existen’, cui quidem ballivo execut’, &c. virtute cujus præcepti postea, scilicet, 2 Feb. 1 Geo. apud Ivelchester præd’ process’ fuit ad election’ duor’ burgen’ pro eodem burgo de Ivelchester ad idem parliament’ veniend’ secundum formam & effectum brevis præd’, & superinde idem E. Phillips & quidam J. B. Miles, W. B. Ar’ & J. H. Ar’ fuer’ & steter’ candidat’ ad election’, &c. Et pro manifestation’ election’ ill’ numerat’ capit’, Anglice *a poll*, suffragan’ ill’ de hujusmodi election’ per quosdam eorum requisit’ existen’, adtunc & ibidem in script’ capta & habita fuit, coram præfat’ T. Smith tunc ballivo burgi ill’ existen’, & ipse idem T. Smith eandem numeration’ capit’ adtunc & ibidem recepit & habuit, & post numeration’ capit’ suffragan’ de, in & pro election’ capt’ & habit’, ac finit, scilicet,

[280]

De Term. Pasch. 4 Geo. 1.

10 Feb' primo Geo. apud Ivelcheſter præd' idem E. Philips requiſivit præd' T. Smith ballivum burgi præd' tunc exiſten' ad deliberand' eidem E. Phillips, copiam numeration' capie', Angl' *a copy of the poll*, ſuffragan' de eadem election' capt', & adtunc & ibidem parat' fuit & obtulit ad ſolvend' præfat' T. Smith' aliquam rationabil' denarior' ſummam pro ſcription' inde quam ipſe proinde requireret, præd' tamen T. Smith ballivus burgi præd' ut præfert' exiſten', cui execution' præcept' præd' de election' burgen' ut præfert' adtunc pertinuit, debit' officii' ſui ballivi ejuſdem burgi in hac parte ac ſtat' in huiuſmodi caſu edit' & proviſ' minime ponderans, &c. adtunc vel poſtea non deliberavit eidem E. Philips copiam, &c. ſed ill' ei deliberare adtunc & poſtea voluntarie penitus recuſavit, cont' form' ſtat' ill', per quod, &c.

The defendant pleaded *nil debet*, and thereupon iſſue was joined.

Upon which a *venire facias* was awarded and continued *per vic' non miſſit breve* till 15 Mart and then a *venire facias* was awarded returnable *oct' pur'*.

But the *venire* taken out was teſted 23 Jan. returnable *Oct. pur'*, upon which a *distringas* iſſued, omitting the word *vic'* in the direction of the writ. Upon the trial at the aſſizes there was a verdict for the plaintiff, and judgment thereon.

And now there were theſe errors aſſigned.

Fiſt, That the plaintiff's attorney had no warrant of attorney.

Secondly, That there was no *ven' facias*, as is ſuppoſed by the record.

Thirdly, That there was no ſuch writ of *distringas*.

Fourthly, That no bill was filed which warranted the declaration and judgment.

[281] Fifthly, The general error, that the judgment was for the plaintiff, whereas it ought to have been for the defendant. And upon a certiorari returned it appeared, that the *ven' fac'* iſſued teſted 23 Jan. whereas it was awarded 15 Mar.

That the warrant of attorney for the plaintiff was, *E. Philips po' lo' ſuo H. G. attorn' ſuum uſus T. Smith ballivum bugi de Ivelcheſter*.

That the *distringas* was *Georgius Dei Gra' Somerſet ſaltem*, omitting *vic'* That the bill was filed Paſch. 1 Geo. without

De Term. Pasch. 4 Geo. 1.

out any continuance entered till Pasch. 2 Geo. when the declaration was entered upon record.

After error assigned as before mentioned, the Court of King's Bench was moved, that the record might be amended.

First, That in the warrant of attorney the word *bugi* be made *burgi*; for the warrant of attorney was not filed till Trin. 2 Geo. though the bill was filed P. 1 Geo. and the declaration was Pas. 2 Geo. and it is sufficient that the warrant of attorney be filed in the same term in which the issue was joined, and therefore the warrant of attorney here was filed in due time. By the statute 32 H. 8. 30. All persons shall deliver their warrants of attorney to be entered on record, &c. in the same term when the issue is entered, &c.

Then the warrant of attorney here not being filed till Trin. 2 Geo. and the plaintiff having before appeared and declared by the said H. G. his attorney against the defendant *T. Smith ballivum burgi de Ivelcheſter*, it appears that H. G. was his attorney against the same *Tho. Smith ballivum burgi de Ivelcheſter*, and therefore when the entry is *po' lo' ſuo H. G. attorn' ſuum verſus Tho. Smith ballivum bugi de Ivelcheſter*, this was a miſpriſion of the clerk, who wrote *bugi* for *burgi*, and ought to be amended by the record, in which the entry was well made.

And though it was objected that the bill and the declaration were ſubſequent to the warrant of attorney, and therefore the entry cannot be amended by them, yet it was amended.

Secondly, That the teſte of the *venire facias* which was 23 Jan. ſhould be amended and made 28 Nov. for the *venire facias* was awarded by the Court 15 Mart' which was the laſt day of Mich. term, and this was a warrant to the clerk to make the writ bear teſte the ſame day, and if he did not do it, his miſpriſion ſhall be amended by ſtat. 8. H. 6. c. 12. which enacts that judges may examine, and in affirmation of judgment amend what to them ſeems the miſpriſion of the clerk in any proceſs, &c. and therefore where a *venire* was teſted after the return of the writ, viz. 12 Feb. which was the laſt day of Hill. term, and the return was 15 Hill' it was amended, Yelv. 64. 2 Cro. 442. Cro. Car. 33. after a writ of error in the Exchequer-chamber on a judgment in an action of debt.

For amendment ſee 51 Co. 121. Rep. Q. A. 131, 132. 6 Mod. 156, 269, to 287. Cumb. 73. 3 Salk. 30, 31. Lucas 270, and a numerous ſtring of caſes cited in Will. edition of Coke's Rep. 8 Co. 156, to 163. Stat. 8 H. 6, ca. 12 and 15. Miſpriſion may be amended. Terms de Ley. 39. Stat. 14 Ed. 3, c. 6. Gilb. Hiſt. 6 B. 110. [282] Stat. 4 H. 6, ca. 3. Palm. 258. 8 Rep. 159. 2 Vent. 152. Cro. Car. 74. Vide ſtat. 5, Geo. 1. ca. 13.

So

De Term. Pasch. 4 Geo. 1.

So if a venire be tested the day before issue joined or pleaded, it shall be amended, for the roll was the warrant for it. 2 Cro. 64.

So if the teste be the same day with the return, so ruled. Mo. 599. 2 Brownl. 102.

So if the teste be upon a *dies non judicus*, as upon a Sunday, as is resolved 2 Cro. 64. Cro. Eliz. 183. Mo. 684. Cro. Eliz. 203. 2 Cro. 162. Moor 684. Cro. Jac. 162. Strange 138. 1 Com. Dig. 316. 1 Term. Rep. 782. 1 Term. Rep. in C. B. 9.

Or if it be tested on a day out of term. Cro. Eliz. 203, 183, 514, 781. 467. Mod. 465. Noy. 57. Cro. Jac. 162. 442. 1 Stra. 138. 1 Com. Dig. 316. 3 Bac. Abr. 273.

So where the return of the venire was not made pursuant to the award on the roll, it was allowed to be amended. Cro. Car. 38. 1 Roll, 200. pl. 35. Ow. 6, 2.

[283] And though it hath been adjudged, that where the venire is tested either before the bill filed, or before the issue, or before the plea, or after judgment, that this shall be aided by the statute of 32 H. c. 30. as a misconveying of process, and that the Court will not intend it to be the venire in the same cause. 2 Cro. 458. Cro. Car. 90. Cro. Eliz. 767, 820. Hard. 321.

Yet by the other case it appears that it may be amended, and there is no authority to the contrary, that in such cases it shall be aided by the statute of jeofails, and need not be amended; in other cases it is usual to amend writs by the roll, as where the *distingas* omits the day and the place of the assizes, *Jackson ver. Warren*; so where a *feri facias* on a judgment in Hill. 27 Car. 2. it was amended, though the execution might be varied by it, 2 Jones 41, and after the Court had considered of it, it was amended by a rule of court.

Thirdly, That the *distingas* might be amended, for the omission of the word *vic'* was but the misprision of the clerk, for the venire was awarded and directed *vic' Somerset*, and upon this a panel of the jurors was returned; then this writ of *distingas* commanded *quod distingas* the same persons, who were returned upon the panel annexed to the venire, *ad comparend' apud Westm' nisi judices assis' prius apud Taunton in Com' tuo venerint, &c.* which was the same as if the writ had been directed *vic' Somerset*, for this cannot be directed to any sheriff but of the same county, and the clerk ought to have made the *distingas* agreeable to the venire;

De Term. Pasch. 4 Geo. 1.

venire; for when the prior process goes to the sheriff of *Somerset*, the subsequent process ought to go accordingly. Where a venire was awarded to the sheriff, omitting the county, yet it was amended, for where the issue arises in a county where the action is brought, the venire ought to be to the sheriff of the same county, and the omission is but a misprision of the clerk. Yelv. 69. So where in a venire, *vic'* was omitted, as here. Cro. Car. 595. 1 Roll. 205, pl. 12. So where the venire was *vic' Warwick*, and the distringas was *vic' Notting'* which is another county, it was amended. 3 Mod. 78. And it was insisted that there is no reason for denying the amendment because this action is founded upon a penal statute, for though it is true that the statute 8 H. 6. cap. 12, except appeals, indictments for treason or felony, and outlawries for the same, and that the statute 32 H. 8. aids only in actions or suits at common law, and 18 El. 14. extends not to actions or informations on any popular or penal statute, and therefore every criminal prosecution is out of the statute of jeofails; yet actions remedial, tho' founded upon penal statutes, have been allowed the benefit of those statutes; and therefore in an action *qui tam*, &c. upon 31 Eliz. for selling horses in *Smithfield* not tolled, it was said that a discontinuance shall be aided by 32 H. 8. 30. 3 Lev. 375.

So in an action *qui tam* upon the statute of usury it was allowed by HOLT. C. J. that the information by the party aggrieved shall be within those statutes, though not common informations. 1 Salk. 324.

So debt upon 2 & 3 Edw. 6, was allowed to be mended. Cro. Car. 275, 278. Jones 302. 1 Roll. 202. pl. 7. 1 Roll. 205, pl. 3. So an action *qui tam*, &c. upon the statute of *Winton*, 1 Roll. 203. pl. 12. 1 Brownl. 156, and afterwards upon consideration the Court allowed the distringas to be amended.

Fourthly, That the continuances be entered upon the bill which was filed Pasch. 1 Geo. and nothing done afterwards till Trin. 2 Geo. when the plaintiff declared, and the defendant pleaded to issue, and was joined.

For the continuance by the course of the King's Bench need not be entered before issue joined, but any time between the issue and the judgment is sufficient; and if they be not entered before judgment, it is the fault of the clerk, which may be amended. 1 Roll. 199. pl. 27. Sir Geo. Trencher, So after error brought. 1 Roll. 205. pl. 6. And at first the

[284]
Amendment as
penal statute,
2 Mod. 144.
2 Barr. 1092.
1099.
Sira. 890,
Fitz. 193.
5 Bur. 2834.

6 Mod. 33.
Holt. 209.
2 Ld. Ray.
977.

[285] the Court doubted, because continuances are the act of the Court, which may be amended at any time before judgment, or in the same term that judgment is given, but not after. 8 Co. 156. b. *Blackmore's case*. Style 339. *Friend ver. Baker*. But after consideration the Court was of opinion that it might be amended, for it appears that continuances may be entered at any time before judgment, and if they are omitted it is the fault of the clerk, which shall be amended before judgment by the common law, 3 Lev. 431. and every thing which was amendable before the judgment by the common law may be amended after judgment by the statute of jeofails, and PRATT C. J. said that they had inquired into the course of the Common Pleas, and were informed that after judgment they were entered of course by the clerk, unless restrained by rule of court; so they are always amendable of course in the King's Bench. And there seems to be a difference where there is a misentry of a continuance and where the entry is omitted, 8 Co. 156, b. the continuance was *per jur' inter B. & C.* (which was between tenant and vouchee) in such a plea *ponitur in respecti*, whereas it ought to be *jur' inter W. & C. quem B. vocavit ad warrant*, and it was amended by the Court.

So Style 334. The continuance was from Pasch. to Mich. leaving out a term.

Cro. Eliz. 433. So. Cro. Eliz. 618. Yelv. 155. where the continuance was given to a stranger or to one who did not appear.

Raym. 417. But the Court agreed it to be amendable when the continuance was given to one where it ought to be given to two. 1 Keb 563. Cro. Eliz. 618.

So after verdict. 2 Cro. 211. 2 Mod. 216. So continuances upon a *fieri facias* or a *latitat*. 1 Syd. 53, 59.

And upon the general error assigned, exception was taken to the declaration.

[286] First, Because it is said *quod villa de Iwelcheſter eſt antiquus burgus, & duo burgenſes de tempore cujus, &c. electi fuer' & eligi conſuever' per burgen' & inhabitant', &c.* and doth not ſay that it is a borough time out of mind, &c. nor doth it alledge any preſcription in the corporation to ſend burgeſſes. To which it was answered, that where title is not made to the thing itſelf, but to a privilege or liberty within it, it is ſufficient to ſay *quod eſt antiqua civitas, villa, &c.* without ſaying *de tempore cujus, &c.* as where a *modus decimandi* was alledged for lands in a park, it is ſufficient to ſay

De Term. Pasch. 4 Geo. 1.

say *quod fuit antiquus parcus*, Hob. 44, 188. otherwise it is if title was made in a *quo warranto* to the park itself. So if 2 man makes title to an office, he ought to prescribe for it, but if he makes title to any thing appendant or incident to the office, it is sufficient to say *quod est antiquum officium*. Dyer 71. pl. 42. Cro. El. 180, 363, 441, 636.

In this case it is but an inducement to the action, which is founded upon a refusal to deliver a copy of the poll, and the mentioning the title to send burgesses to Parliament is not necessary, for it could not be traversed in this action, and therefore it would have been sufficient if he had begun the declaration *quod cum per quoddam breve domine regis intracane*, &c. as in an action for a false return upon an election for members of Parliament.

In an action for refusing a poll at an election for bridg-master, it was said as here, *quod civitas Lond' est antiqua civitas*, &c. and hath used time out of mind, &c. to elect two officers called bridgmasters, &c. 2 Vent. 25.

Secondly, It is said *duo burgenses eligi consuever*, &c. but the declaration doth not shew that the plaintiff was a burgess of the said borough, and if he was not, he was not qualified to be elected. But it was answered, that the declaration saith that a precept was delivered to the defendant, *cui executio*, &c. *pertinuit*, &c. *cujus præcepti prætextu idem def' ad election' duor' burgensium pro eodem burgo processit*, quodq; the plaintiff and three others were candidates *ut ex illis duos burgenses eligerent*. [287]

Thirdly, The right of election is alledged to be *per burgenses et inhabitant'*, and it is said *quidam burgenses pro quer' vociferati sunt*, but it does not appear that they were inhabitants. To which it was answered, that it was said *quod quidam burgenses in ea parte voces et suffragia habentes*, but it was not necessary to shew how the election was, for the right of election was not in issue.

Fourthly, It is not said that notice was given of the time and place of election.

To which it was answered, that the words in the writ of summons *proclamatione facta de loco et tempore præd'*, relate to the election of knights of the shire in the county court, and though the statute requires that the officer in a 7 & 8 Com. borough, &c. give notice of election, yet it is not necessary 3, c 25. in this declaration; it is the duty of the officer, and he shall not excuse himself by his own neglect.

Fifthly,

Fifthly, That it doth not shew any demand of the copy of the poll taken at the time of the election; for it says *quod requisivit copiam, &c. de eadem electione capt'*, which might be, though it was not taken at the time of the election.

To which it was answered, That it is expressly said that he took the poll at the election, *quod post præd' capitum numeration'*, *Anglice Poll, suffragen' de, in et pro electione illa capt'*, the plaintiff *requisivit copiam suffragan' de eadem electione capt'*, and no other poll is mentioned, therefore it is necessarily to be intended that the demand was of a copy of the poll taken at the same election.

Sixthly, That there was no tender of any sum certain for the copy of the poll, but that the declaration only says that the plaintiff *parat' fuit et obtulit ad solvend' def' aliquam rationabilem denarior' summam pro scriptione inde quam ipse requireret.*

[288]

That in pleading a tender of amends they ought to tender a sum certain, and shew the sum tendered, for an officer cannot demand any sum, for if he demands more than is reasonable he will be liable to be indicted for extortion, and therefore it would be unreasonable to subject the officer to it.

To which it was answered, That the words of the statute are *paying a reasonable charge for writing thereof*, and therefore the officer shall give the charge, and make a demand of what he thinks reasonable before the plaintiff can pay it; and it would be impossible for the plaintiff to tender any thing certain before he has the copy, for the charge varies according to the difficulty and length of the writing, and the plaintiff cannot put a price upon another person's labour. This clause was designed for the benefit of the officer, and therefore he ought to do the first act, and make a demand before the plaintiff can know what he ought to pay; and if it be a condition precedent, then it shall be intended that it was proved that he did all that was necessary for him to do to maintain his action, otherwise there could not have been a verdict for him. And the Court made no difficulty as to any of the objections, but with regard to the tender; but upon talking a little together, they agreed the tender was good, for till the officer demands something, or delivers a copy of the poll, the party cannot know what to tender. As where there is a demand of a copy of a commitment, &c. upon the statute 31 Car. 2. it is only necessary to say that he was ready to pay for it; and the judgment was affirmed by all the judges, and afterwards it was affirmed in Parliament.

D E

Term. Sanct. Mich.

5 Geo. 1. In C. B.

[289]

White *versus* Collins.

Case 154

A WRIT OF FALSE JUDGMENT was brought upon a judgment in ejectment given in the court of *Havering atte Bower in com' Essex*, being a court of antient demesne of the manor of the King, in which *White* declared on the demise of *Carew Harvey*, alias *Mildmay*, for one messuage, one barn, one garden, one orchard, forty acres of land, forty acres of meadow, and fifty acres of pasture, with their appurtenances, in *Hornchurch infra jurisdiction' cur'*. Upon Not guilty pleaded, at the trial the jury by consent found a special verdict to this effect :

A Limitation to one to take and enjoy the profits of an estate during his life, and after his decease to the heir male of his body, would make an estate-tail, otherwise

where nothing appears that explains the testator's intent to the contrary ;
ant.

That *Francis Harvey* al' *Mildmay*, Esq. was seised in fee of the lands in question, (which were the antient demesne of the crown) and by his will dated 26 July 1701. devised to his eldest son (who was lessor of the plaintiff) two fields for life, and after his death, " I give those two fields to the heir male of his body lawfully begotten, during the term of his natural life ; and after the death of such heir male, I give the said fields, and all the lands and tenements not sold by my executors and trustees, to my son *Francis Mildmay* during his life ; and to the heir male of his body lawfully begotten, during the term of his natural life ; and for want of such heir male, I give those two fields and all my lands not sold, &c. to my son *Carew Mildmay* during his life ; and after his death, to the heir male of his body lawfully begotten, during the term of his natural life ; and for want of such heir male, I give the said fields and lands amongst all my daughters which shall be alive at my death."

And by another clause in the said will he devises the lands in question by these words, (viz.) " I give to my son *Frank Mildmay*

Owen 148.
Moor 593.
1 Roll. 839.
2 Roll. 417.
1 Stra. 15.
1d. Raym.
205.
Fitzg. 24.
1 Bur. 42.
45.
3 Com.Dig.
26.
Powel on
Dev. 363.
2 Stra. 798.
804.

[290]

Mildmay my farm called *East-House Farm*, &c. to enjoy the rents and profits thereof during the term of his natural life, with power to make a jointure of all or part if he should marry; and after his death and jointure, if any be made, to the heir male of his body lawfully begotten, during the term of his natural life; and for want of such heir male, I give the said farm to my son *Carew Mildmay* during his life; and after his death, I give it to my grandchild *Carew Mildmay* during his life; and after he gave it to his grandchildren *Edward* and *Richard Mildmay*, equally to be divided".

The jury further found, That the testator died leaving *Carew Mildmay* his eldest son, and *Francis* his second son; that the eldest son, at the time of the will made and the death of the testator, had issue *Carew*, *Edmund*, and *Richard*, but *Frank* the second son was not married, nor had any issue; that *Frank Mildmay* entered, and by deeds of lease and release dated 9 & 10 July conveyed the said lands, called *East-House Farm* to *Robert Coleman* and his heirs, to make him tenant of the freehold, against whom a common recovery might be had, to the use of *Frank Mildmay* and his heirs; and afterwards, at the court for the manor of *Havering atte Bower* 22d July, upon writ of right close tested 23 Jan. a recovery was suffered, in which *Frank Mildmay* was vouchee, who afterwards by his will dated 8 March 1714, devised the said lands to his younger brother, &c. and died; the younger brother entered and was seised *prout lex postulat*; upon whom *Carew Mildmay* the lessor of the plaintiff entered, and demised to the plaintiff; and if, &c.

The common error was assigned, and the principal question upon this special verdict was:

[291] If by this devise to *Frank Mildmay* he was tenant in tail, or for life only?

For if he was only tenant for life, his recovery is of no avail, and the lessor of the plaintiff will have a good title; but if he was tenant in tail, his recovery has barred, or at least discontinued the remainders limited by his father's will, and then the lessor of the plaintiff has no title or entry. I held, that the common recovery barred the intail. Kit. 97.

I argued, that by this devise of *Francis Harvey* al^r *Mildmay*, his son *Frank Mildmay* had an estate tail; and for the better apprehending this, it will be necessary to consider the words of the devise.

If the devise had been, "I give to my son *Frank Mildmay*, and to the heir male of his body;" this would without question have been an estate-tail, though the word heir is in the singular number; for the word heir is *nomen collectivum*, and comprehends all the heirs which shall descend from his body; and so it was agreed by all the justices in the case of *Clark ver. Day*, Cro. Eliz. 313. Owen 148. though in the principal case there the Court was divided.

In a conveyance at common law those words make an estate-tail. Co. Lit. 22. a. cites the case 39 Aff. 20. where the grant was to baron and feme *& uni hæred' de corpore suo procreat', & uni hæred' tantum, &c.* In an assise brought by the donor against the heir, who pleaded their grant in bar to the assise, the plaintiff insisted, that the baron and feme had but an estate for life; but it was held by all the Justices, that the plaintiff had no cause of assise, and was nonsuited.

So Reg. Jud. 6. a *scire faciās* was brought to execute a fine by the heir of him in remainder, where the estate was rendered to R. for life, and after his death to G. and the heirs of his body, *et si obierit sine hærede masculo de corpore suo procreat', remaneret* to his brother *J. et hæred' masculo de corpore suo, &c.*

There is no necessity to cite cases to prove that the word heir is *nomen collectivum*, many are mentioned in 2 Roll. Abr. 253.

Secondly, if the words of the devise had been, "I give to my son *Frank*, &c. to enjoy the rents and profits thereof during the term of his natural life, with power to make a jointure of all or part, if he should marry; and after his death and jointure, if any be made, to the heir male of his body lawfully begotten," without saying any thing more, this would have been an estate-tail.

If there be a devise to a man for life, and after his death to the heirs of his body; it is fully agreed by the law-books, that this makes an estate-tail. In *Wild's* case, as reported by Mo. 397. Popham says, that if there be a devise to a man for life, and afterward to his heir male, this makes an entail; and cites a case — Bend. 4 Eliz. where it was adjudged, that a devise to one for life, and after his death to the men-children of his body, was held an estate tail.

Sondys's case, 9 Co. 127. b. was this, *Merrick* seised in fee, and having five sons, *William, Samuel, Thomas, Richard* and *Daniel*, devised to his wife for life, and after her death his son *William* to have it; and if his son *William* marry,

Words which create an estate-tail.
2 Roll. abr. 253.
1 Roll. abr. 832. K. pl. 1 626.
2 Godb. 155.
T. Jones 111.
Rob. Gavell 95, 96.
Viner's abridg. 'Devise'
U. a pl. 13.
& Parols. See 1 Stra. 14.
2 Cases in Equity 37. pl. 31

[292]

Cro. Car.
367, 369.
Hardr. 149.

[293]

and have any male issue, &c. then his son to have the house; if he have no male issue, &c. to his son *Samuel in totidem verbis*; and if *Samuel* have no issue male, then his son *Thomas* to have the house; if *Thomas* marry, having a male issue of his body lawfully begotten, then his son to have the house after his decease; if he have no male issue, then to *Richard*, and then to *Daniel* in the same words; and if any of his sons or their heirs male, issue of their bodies, go about to alien, &c. the next heir to enter, &c. *William* and *Samuel* die without issue male; and it was adjudged, that *Thomas* had an estate-tail; and therefore his recovery good, though the limitation was, if *Thomas* marry, having a male issue, in the singular number, and though it was said that such son (not issue) shall have it after his death; for upon the whole of the words it appears that *Richard* was not to have it, but in default of issue male of *Thomas*.

A man devises to R. his eldest son for ever, and after his death to the heirs male of his body for ever, & *pro defectu, talis heredis masculi* (all in the singular number to E. his other son for ever, for the book is wrong printed, *eldest son*, whereas it ought to have been *other son*, adjudged by this devise R. had an estate-tail, not for life only. Trin. 11 Jac. B. R. *Welkins* versus *Whiting*, 1 Rol. Abr. 836. pl. 11.

And it was adjudged without any difficulty, that a devise to A. for life, upon conditions mentioned in the will, and after his decease to the use of the heirs of his body, makes an estate-tail in A. though limited to him expressly for life only. Hill. 18 & 19 Car. 2. C. B. *Randal* ver. *Ely*, Cart. 171.

The case of *King* and *Melling*, 24 Car. 2. is stronger; *Robert Melling* devises to his son *Barnard Melling*, who had then a wife named *Elizabeth*, for life, and after his death in these words, viz. "I give the same to the issue of his body lawfully begotten on the body of any second wife he shall happen to marry, and for want of such issue, to my son *John Melling*, and his heirs, provided *Barnard* may make any such second wife a jointure which she may enjoy for her life;" in this case it was strongly urged, that the devise being to *Barnard* expressly for life with a power to make a jointure, that issue being a good name of purchase, comprehending all the issue of the second marriage, to which the testator appears to have an equal regard, and that they should all take; if it be taken to be a name of purchase, *Barnard* by this devise shall take only an estate for life with contingent

contingent remainder to the issues of the second marriage in tail; remainder to *John Melling* in fee; and in the King's Bench two Judges were of the same opinion, and *HALE C. J.* said, that at first he was of the same opinion, but upon great consideration of the case, and the consequences of it, and on a thorough examination of the will and the authorities, he held that *Barnard* had an estate-tail, and so it was resolved by all the Judges in the Exchequer-chamber upon a writ of error. 1 Vent. 225. 2 Lev. 58. Poll. 101.

[294]

And *Ventris* 270. says that *C. J. HALE* in his argument cited *Buckley's case* 43 Eliz. where there was a devise to A. for life, remainder to his next heir male, and in default of such heir male, remainder to another; adjudged that A. had an estate-tail; and Vent. 232, says he also cited the case of *Hansley versus Lowther*, adjudged 1651, where a copyholder surrendered to the use of his will, and thereby devised it to his eldest son for life, and after his decease to the heir male of his body, &c. Resolved, That the son had an estate-tail.

This last case seems to be the same as is mentioned 2 Rol. Abr. 252, pl. 4. between *Pawsey* and *Lowdell*, Pasch. 1651, and reported by *Stile*.

Roll says that the devise was to B. for life, and after his death to the heir of his body begotten for ever, and that it was resolved to be a fee executed in B. but by *Stile* it appears to be resolved that it was an estate-tail, and so it is cited Poll. 108.

By all these cases it appears that if there be a devise to one for life, and after his death to the heir, issue or children of his body, this makes an estate-tail, as if it had been limited to him and the heir or issue of his body directly, without the words *for life or after his decease*; that if the limitation be to the heir male of his body in the singular number, it has the same effect as if it had been to the heirs male, &c. in the plural number.

And by the resolution in the case of *King versus Melling*, it appears that a power to make a jointure makes no difference, for as *HALE* says Vent. 232, tenant in tail cannot make a jointure out of his estate without discontinuing, or merging or destroying the estate-tail. But in the present case, to enforce this construction, that the testator intended his son *Frank* an estate of inheritance and not an estate for life only, I must observe that the words are not, "I give

[295]

to my son *Frank* my farm, &c. called *East house farm*, for his life, but I give to my son *Frank* my farm, to enjoy the rents and profits thereof during the term of his natural life, with power to make a jointure, and after his decease and jointure, to the heir male of his body, &c. Therefore the words *I give*, which begin the sentence, govern the whole clause; the bequest or gift is not made to the heir male after the death of the father, but only to the father and his heir male. The heir male cannot take by any substantive clause of devise to him, but only by virtue of the devise to his father; and then the words *to enjoy the rents and profits during his life*, do not import that the testator intended him only an estate for life, but that the testator took notice of the effect and consequence of the estate by him devised; he gave this farm to his son *Frank*, and the heirs male of his body, with power to make a jointure, in consequence of which devise, his son must enjoy the rents and profits during his life, the jointress after him, if any jointure be made, and after the death of the father and jointress the heirs male; this seems to be the obvious construction and intent of the words, and the words, if there is no occasion, may be transposed to support the intent.

Secondly, It is to be observed that the limitation is to his son *Frank* and the heir male of his body lawfully begotten, which is the usual phrase and expression in limiting an estate-tail, and gives some ground to imagine the testator had such an estate in his intention.

[296] Thirdly, The limitation is to the heir male of the body of *Frank*, and in limitations by will it is material to observe from whose body the heir who is to take, is to proceed, in order to the better determining in whom the estate-tail is to be fixed; for where the limitation is to one and the heirs of his body generally the estate-tail vests in him, for the rule laid down Co. Lit. 22. b. that where the ancestor takes an estate for life, and afterwards there is a limitation to his right heirs, the heir shall not be a purchaser, obtains in the construction of wills.

If a feoffment be made, or a fine levied, or recovery suffered to the use of B. for life, and after his decease to the heirs of the body of B. to be begotten; remainder to D. in fee; B. takes an estate-tail executed in himself, and the heir of his body cannot take by purchase; so in a will, if a devise be to one for life, and afterwards a limitation of the same estate is made to his right heirs, or to the heir, or heirs of his body, or issue, or children of his body; the father

De Term. S. Mich. 5 Geo. 1.

father shall have the whole estate, and his heir or issue shall take by descent, and not by purchase.

Fourthly, It is to be observed that the limitation by the testator to his eldest son was in default of such heir male, the devise was to *Frank* and to the heir male of his body lawfully begotten; and therefore when the devise over to the eldest son is for want of such heir male, it is tantamount to saying, *and for want of the heir male of the body of my son Frank lawfully begotten, I give the said farm to my son Carew Mildway*, which shews apparently the intent of the testator that *Carew* should not take while there was any issue of the body of *Frank*.

These words of themselves are sufficient to create an estate-tail, as *HALE* observes Vent. 230. and for that purpose cites *Robinson's case* 4 Jac. where a man devises to A. for life, and if he dies without issue, then he devises over; it was resolved that A. took an estate-tail, which seems to be the case mentioned in Roll's Abr. 837, pl. 12. Mod. 682. *Robinson versus Miller*, in B. R. though there it is said to be Trin. 7 Jac. and is there more restrictive; If a man devises to his wife for life, and afterwards to his son for life, and if he die without issue, having no son, that B. should have it. Resolved that the son took an estate in tail male.

The latter words then are to be considered, viz. *during the term of his natural life*, if these make any difference in the construction of the will, "I give to my son *Frank*, and the heir male of his body lawfully begotten, during the term of his natural life, and for want of such heir male, I give the said farm to my son *Carew*, &c." [297]

If *Frank* took an estate-tail, then his heir male, when it descended to him) would also take an estate in tail, and his estate would not determine with his life.

And that he did take an estate-tail, besides the reasons and authorities before-mentioned, may be collected from the general intention of the testator, who takes notice, that *Frank* had no issue nor was married, and therefore provides for him that he may make a jointure, and provides for the issue male of that marriage; but such provision would be defective if he provided only for one of such issue, and for him only for life; *all the sons of Frank and their descendants* requires a provision; and it seems more agreeable to the design of the testator, that all should be the objects of his care.

It

It will be also more agreeable to his expressions in other parts of the will, for as to another clause in the will, it is found by the special verdict, that the testator gives to his son *Carew* two fields for his life; and after his death I give those two fields to his heir male of his body lawfully begotten, during the term of his natural life; and after the death of such heir male, I give those fields and all my lands not sold, &c. to my son *Frank*, during the term of his natural life, and to the heir male of his body lawfully to be begotten during his life; and for want of such heir male, I give those fields and lands to my son *Carew* for life, and to the heir male of his body, &c. during his natural life; and for want of such heir male, to his daughters.

[298]

By which clause, though the inaccuracy of the testator appears, and though the words *heir male of his body lawfully begotten*, are used for the designation of any son of *Carew*, who should be his heir after his death, yet it is apparent, first, that he makes a distinction in the use of the same phrase; for his intent appears to be, that *Carew* should have the two fields for his life, and his eldest son, whom he afterwards takes notice of in his will by name, should also have them after the death of his father for life; that *Frank* should have the other lands not sold by his executors, except the two fields, immediately after the death of the testator, and the two fields also after the death of *Carew* and his eldest son, to him and the heirs male of his body; and that in default of such issue the two fields, and the other lands not sold, should go to *Carew* and the heirs of his body; and for want of such issue to the daughters of the testator: And therefore the two fields intended for *Carew* and his eldest son for life are limited, and *after the death of such heir male*, not *for want of such heir male of Frank*, which shews that he made a difference between those expressions; the two fields are devised to *Carew* for life, then to his heir male, (which was *Carew* the grand child of the testator), for life, and after his death to *Frank*; and for want of heir male of *Frank* to *Carew* again; by which it appears, that there was a manifest difference (according to the testator's apprehension) between the words, *after the death of such heir male*, and the words, *for want of such heir male*; for the phrase, *for want of such heir male*, imports *failure of issue male*. And this is the more evident, because after the failure of issue male of *Frank*, and failure of issue male of *Carew*, he devises all the lands to his daughters; and for the

the same reason the words *heir male of his body begotten*, applied to the son of *Carew*, who was then *in esse*, are *designatio personæ*; and *heir male of the body of Frank to be begotten* are words of limitation.

But if in this clause the disposition to *Frank* for life, and after his decease to the heir male of his body lawfully to be begotten for life, and for want of such heir male to *Carew*, &c. make an estate-tail, as it must, unless we suppose, that he disposes of all his lands to his daughters before failure of his issue male, then *de congruo* the same words shall have the same construction in the clause which devises the lands in question.

But then the question remains, What the testator intended by these words, *during the term of his life*? It may be, the testator having used that expression in the beginning of the disposition of his lands, was of opinion, that the repetition of them was necessary to each limitation; or as Lord HALE said, 1 Vent. 232, perhaps the testator apprehended, that the devisee had but an estate for life, for tenant in tail has only an estate for life in many respects, or intended that each devisee should have only an estate for life; but his intention was inconsistent with the rules of law; and in wills where words are added inconsistent with the estate which the testator has devised, they shall be rejected. In all cases where there is a devise to one for life, and after his death to the issue or heirs of his body, the words *during the term of his life* shall be rejected.

[299]

In all languages and authors it is frequent to find words which are abundant, and cannot be taken into the construction consistent with the scope and design of the author: it is therefore less to be wondered at that it should be so in wills, where the testator is *inops concilii*, and by reason of his infirmities many times cannot attend to the accuracy of the expression; and therefore there are frequent instances of this nature, where some words are to be past by or rejected.

In the case of *Newton and Bernardine*, Mo. 127. in debt for rent the case appeared to be this:

Cosham having issue *Thomas*, *Richard* and *Gilbert*, devised twenty nobles to the child of *Thomas* who was dead, and his wife *ensient* for twenty years; and if my son *Richard* die before he hath any issue of his body, so that my land descend to *Gilbert* before he come to twenty-one, my executors shall occupy it till *Gilbert* come to twenty-one years
of

[30] of age. Resolved, That *Richard* had an estate-tail; for the words *before he hath any issue* are tantamount to *without issue*, and then the subsequent words cannot prejudice.

So *Til'ly ver. Collier*, 2 Lev. 162. *Remnant* having three daughters, *Susan*, *Anne* and *Elizabeth*, devises his lands to his wife till his heir be twenty-one, and gives 740l. to *Anne* and *Elizabeth*, and if *Susan* his heir die without heirs before twenty-one, so that the lands come to *Anne*, her portion shall go to *Elizabeth*. Adjudged that *Susan* had estate-tail, and that the words *before twenty one* should be rejected.

So if lands be devised to A. and the heirs male of his body during the term of 500 years, it shall be an estate tail in A. and the words *during the term of 500 years* shall be void; *Lawice ver. Geddard*, 2 Cro. 62. Mo. 773. It is true, that Cro. says, that *Anderson* and *Warburton* held the words, for 500 years to be void; but *Daniel* and *Walmfley* held the words not merely void, but to have such construction, that the estate-tail should cease on the expiration of the 500 years; yet Mo. says, that it was agreed by all the justices, that the limitation for years was void. A writ of error was brought on this judgment, and the first judgment reversed, which is reported 10 Co. 87. And though it is said, 10 Co. 87. that the Chief Justice held, that this was a devise of a term for years, and not of an inheritance; to which *WYNCH* agreed, and that the term determined on the dying without issue: There is no resolution given by the Court upon this point, being controverted between the Judges of the Common Pleas and the King's Bench, in the first cause upon the same will; the difference seems to be, that some of the Judges would transpose the words to make all consistent, and then it would be a devise for 500 years, if A. and the heirs male of his body should so long live; but all the judges, who took the intention of the testator to be to give an estate-tail, held, that the words *during the term of 500 years* should be rejected.

[301] But in the present case, the words *during the term of his life* cannot be transposed consistently; for they cannot receive a construction with any propriety, except where they are placed by the testator; and there, if the prior words grant an estate-tail, they ought to be passed by as of no efficacy.

This case was afterwards argued by Serjeant *SELBY* for the plaintiff in error, and by Serjeant *CHESHIRE* for the defendant, Pas. 5 Geo. 1. and the judgment was affirmed by

De Term. S. Mich. 5 Geo. 1.

by the Court; for it was agreed, that the limitation to *Frank* to enjoy and take the profits during his life, and after his decease, to the heirs male of his body, would make an estate-tail; so if it had been, to the heir male of his body, in the singular number, where nothing appeared which explained the intent to the contrary; but here the intention appeared to be, that such heir male should have the land only for life, which shews that the testator did not intend those words should be taken as words of limitation; and nothing appears in the nature of the expression, which imports that they should be taken so.

Heir male or next heir male (which are the words of the same import, for a man cannot be heir male if he be not next heir male) are words of purchase. In *Archer's* case, 1 Co. 66, b. the devise was, to his right and next heir male, and tho' there his son was then *in esse*, that made no difference, for if he had not a son *in esse*, it would have been a contingent remainder; if he had one, it was a remainder vested. But the reason, upon which it was resolved in *Archer's* case, that the devise to *Robert Archer* for life, and after his decease to his right and next heir male and the heirs male of his body, was not an estate-tail in *Robert Archer*, but only an estate for life, with remainder to his son in tail, was, that the words of limitation being added to the devise to his next heir male, shews that he did not intend the words *next heir male* as words of limitation, but as a description of the person who was to take in remainder; and therefore in this case, where the devise is to *Frank*, and after his decease to the heir male of his body during his life, shews that he intended his son should have in remainder for his life only; and there seems to be no difference between their case and *Archer's* case; and when he devises it over for want of heir male to *Carew Mildmay*, &c. this does not import that *Carew* should not have it till *Frank* died without heirs male generally, but for want of such heir male who was to have it for life.

Newland *versus* Collins. In C. B.

REPLEVIN. The defendant avows, for that *Tho. Collins*, his father was seised in fee, and being so seised 24 May demised to the plaintiff for twenty-one years, to commence after Michaelmas then next ensuing, at the yearly rent of 8l.

That

Import and words of heir male &c. Raym. 38, 333. 3 Keb. 42, 95, 99. 1 Vent. 215. 225. Lit. Rep. 334. Raym. 333. 3 Keb. 18, 176. Godb. 155. 2 Sid. 51. 2 Roll. Rep. 256. Plowd. 29, b. Falm. 304. Ketl. 76. Sty. 240. 1 Roll. 832. 2 Rol. 253. 417. 1 Co. 104, a. 1 Bull. 222, 223. Moor 593. Cro. El. 313. Owen 148. Co. Lit. 8. [302] Cr. Jac 145. 1 Vent. 374. 3 Keb. 39. Co. Lit. 378, a. 7H 4. 23 b. Br. Do. & Rem. 8. Case 155

Inducement to a traverse insufficient, where the traverse is a thing immaterial.

De Term. S. Mich. 5 Geo. 1.

That *Thomas Collins* 1 Dec. 1710, died seised of the reversion, which descended to the defendant as his son and heir, who for rent arrear avowed, &c.

The plaintiff in bar to the avowry said, that *Thomas Collins* was seised in tail, *absque hoc, quod fuit seisis in dominico suo ut de feodo*. To which the defendant demurred, and shewed for cause, that the traverse was a thing immaterial, and the inducement to the traverse insufficient; and it was understood to be agreed, that the plaintiff might traverse the title alledged by the avowant, tho' he need not alledge such title to maintain his avowry. Dy. 365. 2 Cro. 44. Yel. 54. 2 Cro. 681. But then there ought to be a proper inducement to the traverse, to shew the matter contained in the traverse is material; for though the inducement to the traverse is not traversable generally, yet it ought to be such as, if true, will defeat the title of the other party, otherwise the traverse amounts to a negative pregnant. Hob. 321. And therefore in a prohibition, where plaintiff suggests that the prior, &c. was seised in fee, and insists upon the unity of possession time out of mind till the dissolution 31 H. 8. *ratione cujus* he was discharged of tithes; the defendant pleads, that by agreement 1 May 1422. between the master of the hospital of *Burton Legars* and the prior, that tithes should be paid in the hands of the tenants, &c. *absque hoc*, that he was discharged of tithes.

[303]

It was held that the inducement to the traverse was bad, for it did not shew any title which the master of the hospital had to make such agreement, and to the same purpose are the cases Cro. Car. 335. Dyer 305. 2 Cro. 41, 681, Bro. 372. Godb. 427. Cro. Fl. 754.

And therefore here, though *Thomas Collins* the father was seised in tail only, yet his lease might be good, especially where the son being the issue in tail, has affirmed it by his distress and avowry for the rent.

Case 156

Bishop *versus* Brook. In C. B.

Upon non est factum pleaded to a bail-bond, the defendant admits all other

DEBT upon a bail-bond given by the defendant to the sheriffs of *London*, for the appearance of *Humphry Evans* at the suit of the plaintiff, and upon which the forfeiture was assigned by the sheriffs to the plaintiff, according to the statute of 4 & 5 Ann. c. 16. And the plaintiff in

in his declaration declares, that the defendant by obligation *concessit se teneri, &c.* to the sheriffs *sub cond' quod si præd' Humph. Evans compareat, &c. quod quidem script' obl' capt' fuit virtute Stat. 23 H. 6. c. 10. Virtute brevis de cap' ad respond' quer', &c.* but does not say that Evans was arrested by force of the said writ. The defendant pleads *non est factum*; and after verdict for the plaintiff, it was moved in arrest of judgment, that by 4 and 5 Annæ it is said, If any person shall be arrested after the first day of Trin. Term by any writ, &c. out of any her Majesty's Courts of Records at Westminster, at the suit of any common person, and the sheriff take bail from such person, &c. the sheriff at the request and costs of the plaintiff shall assign to him the bail bond, &c. and therefore it ought to appear that the defendant was arrested, otherwise the sheriff has no authority to assign the bail-bond, for by common law it was not assignable, being only a *chase in action*, and therefore when the statutes enables it to be assigned if any person be arrested, &c. it ought to appear by the declaration that he was arrested, otherwise the action fails, and this shall not be aided by a verdict upon *non est factum*, because this matter could not be tried upon such an issue.

matters a-
gainst him,
and depends
upon that
for his de-
fence.

[304]

To this I answered, that the intent of the statute 4 and 5 Anne was, that all bail-bonds in personal actions should be assignable, and by the statute 23 H. 6. c. 10. the sheriff had authority to take bail of all persons by them arrested, or being in their custody, by force of any writ, bill or warrant in any personal action, or by cause of indictment of trespass. And the statute 4 & 5 Anne does not mean that bail-bonds taken upon *capias* on indictments should be assignable; yet all the bonds taken of bail in personal actions were intended to be assignable; but by statute 23 H. 6. the sheriff had no power to take bail but of persons arrested by them or in their custody (that is in arrest by their predecessors;) and therefore the declaration, which says the bail-bond was taken by force of 23 H. 6, and which was upon a *capias* against Evans at the suit of the plaintiff, imports, that Evans was arrested by the sheriff at the suit of the plaintiff, for otherwise he could not take a bail-bond for his appearance by force of that statute, and therefore there the averment that he was arrested is sufficient. Upon demurrer perhaps it might be made dubious, but here, after *non est fact'* pleaded, the defendant has admitted all other matters against him, and depends upon this for his defence.

If

[305] If the defendant had pleaded *nil debet*, it ought to be plainly proved on the trial, that the defendant gave the bail-bond, that *Evans* was arrested upon a *capias* against him, upon which such bail-bond was given to the sheriff, and afterwards assigned to the plaintiff, and upon this declaration such proof was necessary, and therefore upon *nil debet* pleaded, after verdict for the plaintiff he should have his judgment; for the imperfection of the declaration is aided by the verdict, because the arrest must be proved; so for the same reason when the defendant waives the general issue *nil debet*, upon which the special matter might be proved, and relies upon this that the bond was not his deed, he allows all the other matters against him; as in an action of covenant, if a breach is not well assigned, and the defendant pleads *non est factum*, he admits a breach, and after a verdict that it was his deed, judgment shall go against him. 2 Cro. 369. *Muscett ver. Ballett*.

So in an action upon a bond with condition to stand to an award, though the plaintiff generally ought to assign a breach in his replication; yet if the defendant after Oyer pleads *non se submissit*, and that is found against him, the plaintiff shall have judgment though no breach appears. Resolved, 1 Syd. 290. admitted Lutw. 528. Yelv. 78.

So in an action for an escape brought by a plaintiff *durante minoritate*, *H. Stanhope*, if the defendant pleads a removal by *Habeas Corpus* and a commitment to the Fleet, and that matter is traversed, the defendant cannot afterwards take an exception that the plaintiff had not alleged *H. Stanhope* to be within 17 years of age, for he has admitted an authority in the plaintiff to sue. Lutw. 627, 632.

There is a difference where the plaintiff by his declaration shews something which discovers that he has no cause of action, and where he only omits that which was to maintain his action; in the first case the declaration shall not be aided by reason of the bar, in the other case it shall.

After consideration, the Court gave judgment for the plaintiff; for the defendant by his plea of *non est factum* has relied upon this particular matter; and this being found against him the plaintiff shall have judgment.

DEBT upon judgment in C. B. and the declaration was *Effex, sciꝑ*, though the judgment was at *Westminster*, and therefore the action ought to have been brought in *Middlesex*.

The statute 4 & 5 Anne. does not give any remedy upon demurrer,

Upon a general demurrer to the declaration it was urged, That this shall be aided by statute 4 & 5 Anne, c. 16. which enacts that the Judges shall proceed to judgment according to the very right of the action, notwithstanding any default, omission or defect, &c. But the laying the action in a county where it ought not to be laid goes only to the form and course of proceeding, not to the right of action, it is a matter proper to be alledged in abatement of the writ, and by common law could not be pleaded in abatement in debt in this case, for *debit et contract sunt nullius loci*, and though by the statute 6 R. 2. c. 2. in debt, &c. if it appears by the declaration that the contract was made in another county the action shall abate; yet this is but for convenience; and if a bond be given or debt arises in *Middlesex*, and an action is brought thereupon in *Effex*, the Court shall not examine where the action arises, tho' in the time of H. 6. it was done; and if the defendant pleads that the obligation was entered into in *Middlesex*, it will not be a good plea, for if the plaintiff demurs to it, by which the fact is confessed, yet the plaintiff shall have judgment, All. 17, because it appears that this doth not go to the right of the action, for then judgment would be for the defendant; if a trial had been in this case by a jury of the county of *Effex*, it would have been good after a verdict; yet the statute 16 & 17 Car. 2. aids only such defects as do not hinder the Court from giving judgment according to the right of the action. *Sed non allocatur*. For 4 & 5 Anne does not give any remedy upon demurrer, but in matters of the same nature with those which are there specified.

Judgment was given for the defendant; but the plaintiff was afterwards allowed to discontinue upon payment of costs.

[306]

Moore *ver.* —. In C. B.

Case 158

ASSUMPSIT. The defendant pleaded in disability of the plaintiff, that he was a recusant convict, and says, *hat*

In a plea of disability of the plaintiff

that he was a recusant convict, that he did not take the oaths at the quarter-sessions; it is not enough to say & hoc parat est verificare, unless he adds per record.

Vide the case of Colvin and Fletcher. Mod. Caf. Law & Eq. 1 Part. 43.

Co Litt. 128, b.

that the plaintiff was summoned to appear at such a day and place to take the oaths before the justices of the peace according to the statute;

That he made default, and the justices certified to the quarter-sessions, that he was duly summoned, and made default, and such default was recorded *prout patet per record coram, justic' &c. remanen, &c.* and that he did not afterwards take the oaths either at the same sessions, or elsewhere; & *hoc parat est verificare.* The plaintiff demurred to the plea, and for cause of demurrer shewed, that the defendant did not shew the record of the conviction *sub pede sigilli*; and defendant joined in demurrer.

And it was argued by Serjeant REYNOLDS, and afterwards by Serjeant DARNELL for the plaintiff, that the defendant ought to shew the record of the conviction *sub pede sigilli*, and this ought to be by certiorari and mittimus; as if outlawry be pleaded in abatement, it must be pleaded *sub pede sigilli*; and so excommunication.

And so it was resolved in the case of *Woodcroft ver. Lord Petre*, where recusancy was pleaded; and resolved, that it ought to be pleaded *sub pede sigilli*.

To which Serjeant CHESHIRE, and afterwards Serjeant PENGELLY, replied, that a plea of recusancy need not be *sub pede sigilli*; for the record itself is pleaded, and reference is made to the record; and the plaintiff may reply *nul tiel record*, and the Court may write to the justices for the record. When outlawry is pleaded in abatement, the writ of exigent, upon which the outlawry is returned, may be shewn *sub pede sigilli*, viz. the writ itself under seal may be produced. So excommunication must be certified under the seal of the ordinary, and may be shewn under the seal of the ordinary testifying it; but the record itself cannot be certified under the seal of the Court where the record remains.

Another reason why outlawry and excommunication ought to be *sub pede sigilli*, to assure the plaintiff of the verity of the plea; but if the plaintiff accepts the plea, it is then too late to make this objection: If it was not so, it was a reason for refusing the plea, and the plaintiff might sign his judgment; but if he receive the plea, he cannot demur for this defect; and so it was said by HOLT C. J. and afterwards between *Creamer* and — Mich. 11 Annæ, as Serjeant PENGELLY said it appeared by his note of the same case, which it is reported in 1 Salk. but this matter does not appear there.

And

And as to the objection, that when this is shewn for cause of demurrer, it amounts to a refusal of the plea; for how could he refuse it, if he did not submit it to the Court, whether this be not a bad plea for this cause; Serjeant PENGELLY replied, that a plea in abatement is not aided by 4 & 5 Annæ, c. 16. which was intended to aid those pleas only which go to the right of the action; and therefore the shewing this matter for cause of demurrer does not avail any thing; for it was necessary to make the plea good, it would be sufficient to object it, without shewing it for cause of demurrer; and if it was not such a reason as would render the plea bad, if it had not been shewn for cause of demurrer, the shewing it for cause of demurrer will not give it any advantage; as where by 4 & 5 Annæ, no dilatory plea shall be received unless affidavit be made of the truth, or some probable cause be shewn of it to the Court; if the plea be received, it cannot be shewn for cause of demurrer, that there was no affidavit made of the truth of it.

But the Court did not give any opinion, whether it was necessary to plead it *sub pede sigili*. The Chief Justice said, it was pleaded without saying *sub pede sigilli*; but in *Woodriff's* case it was said that it ought not to be so; and *Tracy* said the precedents were so. Clift's Ent. 3. [309]

And if it was a bad plea for this defect, why should not advantage be taken of it, when it is specially assigned for cause? But the Chief Justice said, they would not give any opinion as to that point. But the Court gave judgment that he should answer over upon another point, viz. The plea says, that the plaintiff was duly summoned, and made default, which default was recorded *prout per record' ibidem residen' pat*; and then alledges as matter *in pais*, that he did not take the oaths at the quarter-sessions, or afterwards, *Et hoc parat' est verificare*, without saying *verificare per record'*, whereas there is no conviction till the refusal of the oaths at the sessions; for if he had not appeared before the justices who summoned him, but had afterwards appeared and taken the oaths at the sessions, he could not have been convicted, and therefore it ought to have been said, that he was convicted *prout patet per record'*, *Et c. et hoc parat' est verificare per record'*; and if the statute 4 & 5 Annæ does not extend to pleas in abatement, then this omission is not aided.

Prohibition shall be granted to the spiritual court where a libel is for words spoken of a clergyman, though they immediately regard his function.

[310]

A PROHIBITION was granted *nisi* to the spiritual court, where there was a libel by *Downes* vicar of *Painswick*, in the diocese of *Gloucester*, for these words, *Thou art, or he is false, forsworn or perjured*. And it was now insisted, that by the libel it appears, that the said *Downes* *suit infra sacros ordines*, and vicar of the church of *Painswick* in the diocese of the bishop of *Gloucester*, *quodque ad infamiam, lesion. derogation' & diminution' status, nominis, bonæ fame, sacræque suæ function' sonantia verba diffamatoria sequen' dixit, (viz.) Thou art, or he is (præfat' Johannem Downes innuendo, seu de eodem loquendo) false, forsworn or perjured*; and when a libel is for words spoken of a clergyman with regard to his function, though in other cases for the same words a prohibition may be granted, as for words of passion, or actionable by common law, yet in the case of a clergyman no prohibition shall be granted.

I agree, that if there be a libel in the spiritual court for punishing any one for perjury, or for words which charge a layman with perjury, or perhaps a clergyman with perjury, which appears to be committed in a temporal court, a prohibition will be granted.

But here the charge is general, and therefore if the spiritual court can take cognisance of the offence with which these words charge him, it shall take cognisance also for the defamation with which he is charged.

Spiritual court have jurisdiction over their own members. 1 Ld. Ray. 447, 526. Mot. Ca. 160. Far. 56.

That the spiritual court has cognisance of perjury appears from *Lind. 96. v. Hujusmodi, 315. v. Perjurio*, especially if it be perjury by a spiritual person; and therefore perjury is cause of deprivation. *Lind. 114. v. Canonice dispensatum*; and if a libel be for discovery whether he be perjured, in order for deprivation, no prohibition lies. 1 Sid. 217. And it is agreed by Chief Justice *HOLT*, that the spiritual court has jurisdiction over their own members, and in perjury in the ecclesiastical court in spiritual matters. 1 Salk. 134.

If then the spiritual Court has cognisance of this offence, it shall also have cognisance of the words which charge him with this offence; and though the words are, *is false, forsworn or perjured*, the words being in the disjunctive must be intended to be synonymous to *false and forsworn*, and such perjury as the spiritual court has cognisance of; for *Lind.* says,

De Term. S. Mich. 5 Geo. 1.

says, *perjurium fit tribus modis, jurando contra conscientiam, jurandi illicito, veniendo contra juramentum* Lind. 56. v. *Perjurio*; and therefore this libel being in the disjunctive, shall be construed only of such a falsity as is called perjury, by the ecclesiastical law, and not such as is made perjury by the common law.

And if it were such, the suggestion is not sufficient; for it ought to be suggested, that the words were spoke in reference to an oath taken in a temporal court, &c. and that he pleaded that matter there, and the plea refused, and of which an affidavit ought to have been made; as in 1 Vent. 10. a prohibition was refused to a suit in the spiritual court for these words, *you are an old thief and old whore*; upon a suggestion that if the words were spoke, they were all at the same time, for that ought to have been pleaded to the jurisdiction there. Lutw. 1043, 1054. [311]

Sed non allocatur; For a prohibition lies where the suit is for words actionable at common law, and to say he is perjured is actionable at common law, and if there be a suit for such words in the spiritual court a prohibition lies. 2 Inst. 493. 2 Roll. 297. Goldf. 113. And when the words appear to be actionable, there is no occasion to plead that in the spiritual court; and therefore the rule for the prohibition was made absolute, unless the defendant *crassino die* would accept a declaration in prohibition, upon which this matter might be farther considered.

More ver. Manning. In C. B.

Case 160

ASSUMPSIT. Upon a promissory note given by *Manning* to *Statham* and order; *Statham* assigns it to *Witherhead*, and *Witherhead* to the plaintiff; and upon a demurrer to the declaration an exception was taken, because the assignment was made to *Witherhead*, without saying to him and order, and then he cannot assign it over; for by this means *Statham* who had assigned it to *Witherhead*, without subjecting himself to his order, will be made liable to be sued by any subsequent indorsee. And to this the Chief Justice at first inclined, but afterwards it was resolved by the whole Court, that it was good.

An original bill payable to one and his order, is assignable afterwards to whomsoever it is endorsed, though the words or his order be omitted.

For if the original bill was assignable (as it will be if it be payable to one and to his order) then to whomsoever it is assigned, he has all the interest in the bill, and may assign

De Term. S. Mich. 5 Geo. 1.

Promissory
notes were
not assign-
able at com-
mon law.

1 Salk. 24,
129.

2 Ld. Ray.
747.

3 Bac. abr.

606. Made

Evid. 18.

557. Dougl.

to Order.

it as he pleases, for the assignment to *Witherhead* is an absolute assignment to him, which comprehends his assigns, and therefore nothing is done when the bill is assigned but indorsing the name of the indorser, upon which the indorsee may write what he will, and at a trial when a bill is given in evidence, the party may fill up the blank as he pleases.

assignable by stat. 3 & 4 Ann. c. 9. & 7. Ann. c. 25. sec. 3. Seb. Caf. 2 Sira. 1103. 2 Barnes. 361. 2 Burr. 1225. Stra. 611, 617. For the difference between bills payable to Bearer, and payable to Order. See 1 Salk. 125, 133. 3 Lev. 299. Skinn. 343, 411. Comb. 204, 466.

[312]

Case 161

The King *ver.* Pond. In B. R.

A *noli*
prosequi
may be
granted up-
on an indict-
ment a-
gainst a sur-
geon for re-
fusing to be
conRable.

INDICTMENT against *Pond* a surgeon, for refusing to be constable; and it was now moved to *RAYMOND* Attorney General, that a *noli prosequi* might be granted; for by the statute 5 H. 8. c. 6. upon the petition of the warden and company of Surgeons, it was enacted, That the suppliant be not chargeable of constableness, watch-office, bearing arms and inquests in the city of *London*, and by 32 H. 8. c. 42. all persons of that corporation were exempt from bearing arms or putting on to watch or inquest, and therefore by their charter 2 Jac. 1. they are exempt.

And though it was held that physicians are not exempt, 1 Syd. 431. 1 Mod. 22. 2 Keb. 578. Yet it is said by *Keble*, that surgeons may be exempt, and by the equity of those statutes and custom of the realm, all surgeons have been allowed the same privilege, and therefore a *noli prosequi* was allowed, unless cause; and no cause was shewn as ever I heard.

Case 162

Gilbert, Earl of *Coventry*, *ver.* *Anne*, Countess Dowager of *Coventry*. Intr. Hill 3 Geo. Rot. —. In B. R.

Of the exe-
cution of
powers in
regard to
the making
of leases.
Ante 37.

THIS was an issue directed out of the Court of Chancery to try the validity of five leases made by *Thomas* Earl of *Coventry*, husband of the defendant.

First lease by indenture 30 May 1701, to *S. Shephard* and *H. Crow* for 99 years from the death of Sir *Thomas Haslewood*, bart. if the defendant should so long live, rendering

De Term. S. Mich. 5 Geo. 1.

dering 3l. 8d. *per annum* after the death of the said Sir [313]
Thomas Haslewood.

Second, By indenture 14 July 1710, to them for 99 years from the death of *Nest. Bishop*, if the defendant and *Richard Leggs* should so long live, rendering 4l. 14s. 2d. *per annum*, after the death of the said *Nest. Bishop*, and a heriot or 4l. upon every death.

Third, By indenture 15 July 1710, to them for the same term, from the death of *Armell Green*, at the rent of 18s. 8d. and a heriot or 4l. &c.

Fourth, 17 July 1710, for the same term.

Fifth, 29 July 1710, for the same term.

Upon the trial before J. BLENCOW at the assizes at *Worcester* a special verdict was found.

That *Thomas Lord Coventry* made a lease of the lands in the second lease to *William Bishop* for 99 years, if he, *Robert Bishop* his son, and *Nest. Bishop* his daughter should so long live, rendering 4l. 14s. 2d. *per annum*, and a heriot or 4l. for every death, and doing suit, &c.

That he or his ancestors leased the lands in the other leases for 99 years, if three lives so long lived.

That *Thomas Lord Coventry* being seised of the reversion expectant upon these several leases, upon the marriage of *Thomas* his eldest son with the defendant, by indenture 20 Jan. 1690 conveyed the said lands to the use of himself for life; remainder to *Thomas* his eldest son for life; remainder to his first and other sons in tail male; remainder to *Gilbert* his second son, the now plaintiff, for life, &c. with a power to make leases in these words, " Provided it shall be lawful for every person, who shall be actually seised of the freehold of the premises herein before limited to him in use, to make leases of any part thereof which hath been usually letten by lease for lives or years, of which he shall be so actually seised by virtue of the limitations aforesaid, by indenture for any term not exceeing 21 years, or determinable on one, two or three lives, so as on every such lease be reserved and made payable, during the continuance of such lease, the accustomed rent or more, or as much as can be reasonably got for the same, so as no such lease be made dispunishable of waste, and so as there be not any part of the premises so leased at any one time any more or greater estate or estates, than for 21 years, or for three lives, or for any number of years, determinable on three lives."

[314]

That

De Term. S. Mich. 5 Geo. 1.

That Pasch. 3 W. & M. a fine was levied of the lands to the same uses.

That the Lord *Coventry* died, and *Thomas* the husband of the defendant entered, and was seised for his life, and made the first lease 30 May 1701. That the rent reserved was the ancient and accustomed rent. That all the lives, except the life of Sir *Thomas Haslewood*, were determined at the time of making this lease; that Sir *Thomas Haslewood* attorned tenant pursuant to this lease; that he afterwards made the several other leases, upon which the ancient rents were reserved, and that no prior estate continued *in esse* in any of them except a term for 99 years determinable upon a single life.

And the single question upon this special verdict was, Whether these leases were pursuant to the power?

And I argued that these leases were pursuant to the power, that they were made by the husband of the defendant who was then seised of the freehold by virtue of the limitations in the settlement; that they were made of lands usually leased for lives or years; that they were made by indenture for a term of years determinable upon one or two lives, rendering the accustomed rents, not dispunishable of waste, and that there are not upon any of the lands demised more or greater estates, than estates for years determinable upon three lives.

[315] The principal objection is, that the leases made by the Earl of *Coventry* are leases in reversion.

Cro. Jac. 5. And I argued, that where a power is annexed to the
1 Brownl. estate of one in possession to make leases, without saying in
148, 149. reversion, he can make a lease in possession only, and not
Poph. 9. a lease in reversion to commence *in futuro*. 6 Co. 33. a.
2 Roll. rep. a lease in reversion to commence *in futuro*. 6 Co. 33. a.
402. Mo. 199. 2 Cro. 318. Yelv. 222.

1 Vent. 246. So if the power be to make leases for one, two or three
Raym. 163, lives, he cannot make a lease for a life not *in esse*.
247.

1 Ld. Ray. But if the power be annexed to a settlement of lands,
267. part in possession, and part in reversion, to make leases in
Lutw. 1464. possession or reversion, he may make a lease in reversion of
4 Mod. 265. lands not in possession. 8 Co. 69, b. *Whitlock's case*.
1 Mod. 318. *Winter and Lovedore*. 2 Salk. 537.
6 Co. 33.
4 Co. 70.

5 Mod. 244. So if the power to make leases, annexed to a settlement
245, 373. of estates demised for life or years, be expressly confined to
Vid. 6 Mod. make leases in possession, a lease in reversion or *in futuro* is
10. not warranted by such power. Carth. 18. 1 Sid. 101,
G. E. B. R. 250. 1 Lev. 168.
247.
K. H. 214.

De Term. S. Mich. 5 Geo. 1.

So where a man has power to make a lease pursuant to a power, he shall not make a second lease to commence pursuant to his power. 1 Lev. 36. 3 Lev. 71. 1 Salk. 537.

But where a man makes a settlement of the reversion of ² Roll. rep. lands demised for lives or years, to the use of B. for life, ²⁷⁴ with power to make leases generally, he may make a lease during the continuance of a former lease, to commence after the former, otherwise his power would be ineffectual; and this was agreed in the Marquis of Northampton's case, 1 Lev. 35. 3 Lev. 71. Dy. 537. a. 2 Roll. 261. pl. 8. 1 Lev. 168. 1 Sid. 265.

The intent of this power seems to be, that the party having such power shall fill up the lives as they drop; and if he had done this upon a surrender of the former lease, without doubt it would have been good; and if this is done by another lease of the reversion, it seems to be the same thing in effect, for the estate of him in remainder is not prejudiced more in one case than the other; for if a lease, upon the surrender of a former lease, was to be made determinable upon three lives, it would be of equal duration, and equally disadvantageous to him in remainder or reversion, as if there were two leases which both determined upon the same lives. [316]

And it would be unreasonable, that the prior lessee should have the power to defeat the execution of a power by his surrendering up his lease, or not.

And it seems to be agreeable to the intent of the power in this case, that he who had the freehold by virtue of the limitations in the settlement should be enabled to make leases; for it is the sole qualification required in him for exercising the power; and all the other requisites, as to the manner of exercising his power, are found by the verdict to be observed.

There can be no doubt but upon this requisite, so as there be not at any one time any more or greater estates than for twenty-one years or for three lives, or for years determinable on three lives; and these words shew that it was not the intent of the power to confine the party that he should make but one lease; for it appears by the words in the plural number, that several estates were allowed at the same time, but all were to be determinable on three lives.

As to the objection, that in some of the leases the same heirs are not reserved as were before;

I an-

De Term. S. Mich. 5 Geo. 1.

[317] I answer, that the power requires only that the ancient
 2 Roll. rep. and accustomed rent be reserved ; and if this be reserved,
 171, 407. the reservation of heriots or other casual profits, is not ne-
 Lev. 72, 73. cessary. Co. Lit. 44. b. 6 Co. 37, 38. 2 Cro. 76.
 Digge 107. Mo. 759.
 Cio Jac.

76, 77. If it be objected, that this lease is not a lease of the re-
 Cro. Car. version, but a lease to commence at a future day, for each
 17. lease is for ninety-nine years to commence from the death
 3 Bullst. 291. of the remaining life in the former lease ; that will make
 3 Keb. 107, of the remaining life in the former lease ; that will make
 108. no difference, for the one lease as well as the other is to
 5 Co. 7, b. take effect at the same time when the other determines ;
 and tho' it be to commence after the death of the remaining
 life, and the prior lease may determine before by forfeiture
 or surrender, yet forfeiture or surrender shall not be pre-
 sumed.

A lease to commence from the death of a prior lessee
 for life will be good.

And after many arguments the Court was of opinion,
 that these leases made by *Thomas Earl of Coventry* were
 good, pursuant to the power given him by the settlement.

A PROHIBITION was granted *nisi causa, &c.* to the Marriage of the daughter of the Arch-deacon of *Richmond* in the diocese of *Chester*, where a libel was exhibited for the marriage of the wife's sister held within the levitical degrees; so prohibition denied to spiritual court, where a libel for that purpose was exhibited. Stat. 32 H. 8. ca. 38.

And for cause I insisted that the marriage was within the levitical degrees.

The statute 21 H. 8. ca. 7. enacts, that no person marry within the degrees before rehearsed; and if any be married within the said degrees, the persons so unlawfully married shall be separated by sentence of the archbishops, bishops, or other ministers, &c. within the limits of their jurisdiction and authorities.

The marriages prohibited, and which are to be dissolved by sentence of the spiritual court, are all within the degrees there mentioned, though they are not expressly mentioned in the statute; and therefore when the statute mentions as unlawful the marriage of the son with the aunt, being his father's or mother's sister, or with his uncle's wife who is his aunt by affinity, the marriage of the niece with her uncle by consanguinity or by affinity (which is the present case) is within the same degree, and consequently disallowed by this statute.

[319]

So in *Leviticus*, ch. xviii. v. 12, &c. the Jews are forbid to uncover the nakedness of the father's or mother's brother or sister, viz. the uncle or aunt by father or mother, and the uncle or aunt by affinity, though not named, are within the same degree with the persons there mentioned.

So in the table of kindred and affinity, who by scripture and our laws cannot intermarry, which was published by authority

De Term. S. Mich. 6 Geo. 1.

authority 1563, and which by the 99th canon made in the year 1633. is allowed,

A man cannot marry his wife's sister's daughter; and the canons of 1603, were established in the convocation, which had a licence under the great seal to agree to such canons as they approved, and which were afterwards ratified by the King under the great seal, and therefore are allowed as the ecclesiastical law of this realm. And by canon 99. all marriages prohibited by God's law, and expressed in this table, are declared incestuous and unlawful, and no person shall marry within the degrees prohibited and expressed in the said table, &c.

In the case of *Mann*, who had married the daughter of the sister of his former wife, it was held by the High Commission to be unlawful; and though a prohibition was granted, Mo. 907. Cro. Eliz. 228 yet a consultation was afterwards awarded; for a prohibition ought not to be granted, if it is within the Levitical degrees. Vaugh. 247, 321. 4 Lev. 16.

So in *Pearson's* case, upon such a marriage a prohibition went; but a consultation was afterwards granted Vaugh. 248, 323. And this perhaps is the reason why that case, which was mentioned as having a prohibition granted by the common pleas, in the first edition of Co. Lit. 235. a. without mentioning the consultation, was totally omitted in the subsequent editions.

[320] Hob. 181, in the case of *Howard* ver. *Bartlett*, speaks of *Rennington's* case, who had married the daughter of the sister of his former wife, for which he did penance by order of the High Commission, 16 Jac. and after his death she claimed her free-bench; and it was allowed, because there was no divorce *a vinculo matrimonii*, though Hob. says there was cause. So 2 Inst. 683. Lord Coke says, that though the marriage of the nephew with his aunt be prohibited, Lev. 18, and the marriage of the uncle with his niece be not there prohibited by express words, yet such a marriage is prohibited *qui eandem habet rationem propinquitatis cum eis qui nominatim prohibentur, & sic de similibus*. So by *Vaughan* it is expressly agreed, that the marriage of the uncle with his niece, or with the niece of his wife, is within the Levitical degrees. Vaugh. 323.

So in the case of *Wortley & ux'* ver. *Watkinson*, 33 Car. 2. in B. R. on a prohibition it was strongly argued by *Wallop*,

De Term. S. Mich. 6 Geo. 1.

Wallop, that such a marriage was lawful; yet a consultation was granted. 2 Lev. 254. 2 Jones 118.

And afterwards in the like case between *Watkinson ver. Margatren*, in B. R. Pas. 34 Car. 2. a prohibition was denied. Ray. 464.

Trin 5 W. & M. between *Hanour and Bradshawe*, a prohibition was granted, in order that the plaintiff might declare on such a case; but *Levinz* says he heard no more of it. 3 Lev. 364.

But in the case of *Snowling and his Wife*, ver. *Nuwey*, after two or three arguments, it was resolved by *TREVOR* and all the Court, 1 Annæ, that a consultation should be granted. Lut. 1077.

The same matter was moved in B. R. between *Clement and Beard*, and *HOLT* said there, that he took that question to be settled, for if it was the daughter of his own sister, there could be no question; and if it was the daughter of the wife's sister it is the same relation by affinity, and therefore within the Levitical degrees. 5 Mod. 44⁸. Upon which the rule in this case was discharged.

[321]

Haddy & ux., administrators of *William Gifford*,
ver. *J. Yate Gifford*. In C. B.

Case 164

IN AN ACTION OF DEBT upon a bond given by the defendant to the intestate 29 Apr. 1707.

Upon Oyer of the bond it appeared, that the condition recites, that *William Gifford* was bound with the defendant for a debt of the defendant's by bond of the same date, to pay 51l. 10s. to *Lat. Ridley*, 30 Oct. next; if therefore the defendant pay to the said *Latimer Ridley*, the said 51l. 10s. on the said 30 Oct. in discharge of the said recited obligation, then, &c. The defendant pleaded *quod solvit præd. 51l. 10s. præd. Lat. Ridley, super 33 Oct. in exoneration' recitat' oblig.* The plaintiff replied *quod non solvit*; to which there was a demurrer, and judgment for the plaintiff.

After judgment the defendant brought a writ of error, and did not find bail; upon which the plaintiff sued out execution, for that by the statute 3 Jac. c. 8. it was enacted, that no execution shall be delayed by writ of error, or supersedeas thereon, for reversing any judgment in any action or bill of debt upon any single bond for debt, or upon any obligation with condition for payment of any money only, or upon any action or bill of debt for rent, or upon any contract,

Upon a writ of error brought after judgment, execution ought not to be stayed, if bail be not found. Barnes c. 61.

contract, in any courts of *Westminster*, &c. unless the person, in whose name error is brought, with two sureties first become bound by recognizance, &c. to him for whom judgment is given, in double the sum recovered, to prosecute the writ of error with effect, &c.

[322] And it was insisted by Serjeant WHITAKER, that bail was not required here, for that this obligation was in nature of an obligation to indemnify, which would not be within the statute, which ought to be taken strictly; and therefore, if error be brought in action of debt upon a bond for performance of covenants, bail is not required, neither in debt upon a bond for performance of an award, or for payment of 300l. upon the return of a ship; and for the same reason it is not required in this case; for if the defendant had tendered the money to *Ridley* on the day of payment, in an action of debt brought by *Ridley* against him upon the bond, he might have pleaded this tender and refusal; but to this condition he could not plead it. Co. Lit. 217. And this point was determined in B. R. Hill. 1 Geo. between *Hammond* and *Webb*, when the condition recited a former bond given by the defendant to A. and then goes on, if the said *Webb* shall pay the said sum of 100l. to the said A. on the said 25th of April, then, &c. in the same words as the present case. And the Court were of opinion, that bail was not necessary, for it was of the same nature with a bond to indemnify, though no judgment be entered up in that case, because the plaintiff affirmed his judgment on the writ of error.

Show. 14.

But on the other side it was urged, that this bond is only for the payment of money, and so without doubt within the letter of the statute: But bonds for performance of covenants, awards, &c. or for payment of money upon the return of a ship on a bottomree-contract, or to indemnify, are out of the letter of the act, and therefore good reason that bail shall not be required upon a writ of error on such actions.

But where the bond is within the words of the statute, this statute has been construed beneficially for the subject; and therefore where there was a condition for the payment of such a sum of money to B. as A. should declare to be due from the defendant to him, upon an account stated between the plaintiff and defendant, it was resolved, that bail was necessary in a writ of error, by three Judges against Ke-

Yelv. 227

LYNE. 1 Lev. 117.

So in action against an executor or administrator, if judgment is generally against him *de bonis propriis*, and he brings a writ of error, he must find bail. 2 Cro. 350. 1 Sid. 368. And the case between *Hammond* and *Webb* was not determined, for no judgment was given, and therefore nothing appears but that the Court doubted upon this point. [323]

The Ch. J. KING seemed to think that this case was within the letter of 3 Jac. 1, c. 8. and he thought that this statute ought to have a liberal construction; but because the Judges of the King's Bench doubted, and inclined to the contrary opinion, that there might be one uniform opinion in the two Courts, it was agreed to be put off till the court could talk with the Judges of the King's Bench. 11 Mod. 2.

And in the last day but one of the term the Chief Justice delivered the opinion of the Court, and said,

That this Court was agreed that execution ought not to be stayed in this case, if bail was not found; for the statute ought to be construed liberally, and for the benefit of him who had obtained judgment, and that no judgment was given in the case of *Hammond* and *Webb*, and therefore the rule for staying execution was discharged.

Salmon *ver.* Denham & al.' In C. B.

Case 165

EJECTMENT, upon the demise of *Stephen Saunderson*, and a second demise alledged by *Thomas Saunderson*,

What words in a will shall make an estate in fee, what not.

Upon not guilty pleaded, the jury at York assizes on the second demise found the defendant not guilty.

As to the first devise they found specially, that *John Little* being seised in fee had three sisters, *Elizabeth*, *Dorothy* and *Jane*; that *Jane* married *William Brown*, by whom she had issue *William*, *John*, *Hannah*, *Mary*, and *Dorothy*; that *Hannah* married *Stephen Saunderson* the lessor of the plaintiff, by whom she had issue *Thomas Saunderson* the second lessor, now alive; that *John Little* being seised, by his will 26 Sept. 1674 devised other lands to *Thomas Chappell* his sister's son and the heirs of his body; remainder to *William Brown*, *John Brown*, *Thomas Mitchel* and *George Scarf* his sisters sons and their heirs, paying 5l. yearly to *Elizabeth Scarf* during her life other lands he devised to *William Brown* and the heirs of his body, and for want of such issue to *John Brown*, *Thomas Chappell*, *Thomas Mitchell* and *Geo. Scarf* and their heirs. [324]

Then

Then he adds these words, *Item, I give my house and lands, (which were the lands in question,) to John Brown, the said William Brown paying to Elizabeth Scarf, 3l. yearly during her life, and the said John Brown paying to the said Elizabeth Scarf, 2l. yearly during her life.*

Other lands he devised to *George Scarf* and the heirs of his body, remainder to *William Brown, John Brown, Thomas Chappell, Thomas Mitchell* and their heirs.

Then he devises several legacies, and devises several lands to be sold for the payment of his debts and legacies, and afterwards adds this clause.

If the lands I have assigned to be sold, and my personal estate, will not hold out to pay my debts and legacies, what shall be unpaid shall be paid out of the proportion of the lands I have given to *William Brown, John Brown* and *Geo. Scarf*.

The jury found that *John Little* died, and his sisters *Elizabeth* and *Dorothy*, and *William Brown* the son and heir of *Jane* the other sister, were his heirs.

That *Elizabeth* died, having issue now alive, that *Dorothy* died without issue, that *William Brown* heir of *Jane* died without issue, and afterwards *John Brown* died without issue, and after his death *Stephen Saunderson*, in right of *Hannah* his wife, entered on the lands devised to *John Brown*, and that afterwards *Hannah* died, *Dorothy* and *Mary* being now living.

That the lands in question devised to *John Brown* are 10l. *per annum* and no more, and if upon the whole the Court be of opinion for the plaintiff, they find for the plaintiff; otherwise for the defendant.

And after argument by Serjeant PENGELLY for the plaintiff, and Serjeant WYNNE for the defendant, it was now argued by myself for the plaintiff, and by Serjeant CHESHIRE for the defendant.

And for the plaintiff it was insisted, that the lessor of the plaintiff had title *quacunqve via*, for if *John Brown* had only an estate for life, he was only intitled to a fifth part of the reversion; if he had an estate in fee, he was intitled to a third part.

And it was argued that the lessor of the plaintiff ought to have a third part, for that *John Brown* by this devise took an estate in fee; for if a man devises lands without limiting any estate, the devisee paying a sum in gross, this shall be by construction an estate in fee. This is settled, Bro.

Swinb. 133,
118.
Rep. Queen
Anne, 102.
to 104, &
208.

De Term S. Mich. 6 Geo 1.

Bro. Estates 28, Testaments 8. 3 Co. *Wellock and Hammond*, 6 Co. 16, 2. *Collier's* case, 2 Cro. 527, 591, 599, 600. 1 And. 38. 1 Rol. 834. and in many other cases.

3 Co. 21, 2.
Co. Lit. 9,
b. 11, a.
Cro. El. 205.
Bro. Tett.
18, 78.
Dyer 371,
pl. 5. 74.
1 Rol. abr.
834.
Cro. Eliz.
146, 202,
205, 360,
376, 378,
445, 833.

And though in this case the devise to *John Brown* is, paying 5l. *per annum*, to *Elizabeth Scarf*, during her life, this makes no difference, for it is a sum in gross, and is to continue during the life of *Elizabeth Scarf*, and therefore it must be in fee, otherwise the estate devised might determine before the life of *Elizabeth*, to whom the 5l. a year is payable.

In the case of *Webb and Herring*, 2 Cro. 415. there was a devise to his son, and if his three daughters outlive his son and heirs, they to have for life; and then I give the same to my sisters, they pay 6l. 10s. yearly to the *Merchant-Tailors Company*, and if they deny payment the Company to enter.

[326]

It was adjudged that the sisters had a fee; so 2 Cro. 527, 2 Rol. 80. *Spicer ver. Spicer*, a devise to his wife for life, paying 3l. *per annum*, out of the profits to *Thomas* for his life, and if she die before *Thomas* to his son *Richard*, he likewise paying 3l. a year to *Thomas* for his life, and 20s. to his sisters. Roll. reports it that 20s. yearly to L. for life; and it was resolved that *Richard* had a fee, for 20s. is a sum collateral, and does not issue out of the land, and the value is not material; for if it was only a penny to be paid, it being a collateral sum which does not issue out of the profits, the devisee shall have a fee; *HOUGHTON* said, for this reason, because the devisee, who is to pay L. during his life, must have an estate to continue during the life of L. and therefore must have a greater estate than for his own life, for L. may survive him.

So in the case 27 Car. 2. *Read ver. Hatton*, Poll. 399. 2 Mod. 25, a devise to *Robert* his son, upon condition that he pay 5l. a year to his sisters, the first payment to be made at the first of the usual feasts which shall happen next after his death, so it be a month after his death, though the estate devised was 16l. a year; yet it was adjudged that *Robert* had a fee. So *Lee and Withers*, 2 Jon. 107. Pollex. 545. a devise to *James* conditionally, that he allow his son *Nicholas* meat, drink, washing and lodging, during his life; tho it was urged, that the word *allow* imported it to be out of the profits, yet it was resolved that it was a fee.

And

And the difference is only where the payment is limited to be paid out of the profits, and where it is not limited; for this is the distinction taken 6 Co. 16. in *Collier's* case, a devise, paying a sum in gross; shall be a fee; paying therefore 20s. yearly shall be only for life, which alludes to the case Dy. 371. b. where a devise to the wife after the death of his father, paying therefore to the right heirs of my father 40s. yearly during her life, was adjudged only a devise for life. So *Annesley ver. Chapman*, Cro. Car. 157. Jon. [327] 211. A devise to his sons, and they to bear part and part alike going out of the lands for life, this was only an estate for life.

But if there was any doubt whether this clause gave *J. Brown* a fee, yet it would be removed by the clause which says, that if the estate to be sold and his personal estate will not hold out to pay his debts and legacies, what is unpaid shall be paid out of the proportion of the lands given to *William Brown*, *J. Brown*, and *Geo. Scarf*, for a devise of lands to pay debts and legacies will carry a fee; so Dy. 371. b. a devise of lands to a man's sister, except my manor, which I appoint to pay my debts, will be a devise of the manor in fee.

Dyer 74.
Vile cases
Ante 325.

So a devise to perform a man's will, and to pay debts and legacies, was resolved by all the Justices in C. B. to be a fee. Bend. pl. 66. And so it was decreed in Chancery. Ca. Chan. 196.

And afterwards in the same term judgment was given for the plaintiff by the whole court; for the Chief Justice said, that they were all clearly agreed in their opinions, that *J. Brown* had by this devise an estate in fee upon the whole of the will; though if it had been put upon the first words only, paying 5l. *per annum* to *El. Scarf*, for her life, they had not been all so clear in their opinions.

10 Co. 41.
2 Brow. 68.
Gab. on dev.
21, 22, 119.
Cro. Car.
138.
Carth. 93,
171.
2 Roll. rep
219. 425.
Goldf. 134. Noy 51. Owen 112. 1 Leon. 283. 1 Lut. 809. Eq. Caf. abr. 206.
3 Wilf. 248. Ante 72, 123. Lord Raymond 829. Salk. 242. Stra. 129, 799, 1086,
1128. Andr. 125. B. R. H. 28. 10 Mod. 419. 3 Comyns' Dig. 24, 35. 1 Bac.
Abr. 328. 2 Bac. abr. 72. 3 Bac. abr. 18, 23. 4 Burr. 1933, 1940. 1 Blackf.
Rep. 310. 2 Black. Commen. 156. Lord Nott. arugm. 35. 1 Bro. Chanc. rep. 191.
Swinb. 113. 4 Bac. abr. 321. Powel on Dev. 263. Cowp. 836. 1 Brow. Caf.
Chanc. 194.

De Term. S. Mich. 6 Geo. 1.

William Vaisey *ver.* Hundred of Whiston. in Com. Case 166
Gloucester. In C. B.

ACTION upon the statute 13 Ed. 1. in which the plaintiff declares *de placito quod quidam malefactor*, upon the statute 13 Ed. 1. for a robbery, it ought to appear that the plaintiff has the [328] whole property in the money of which the robbery was committed; or otherwise if entire damages be given, it will be bad in toto.

in quosdam Johannem Goodman & Robertum Capell servien' ipsius quer' insult' fecer' & 67l. consisten' de diversis peciis auri cusi vocat' *guineas*, & diversis peciis auri cusi vocat' *half guineas*, de denar' ipsius Gul' Vaisey propriis, in manibus et custod' præd' Johannis invent', existen', ac viginti peciis auri cusi vocat' *guineas*, in manibus et custodia præd' Roberti invent' existen', de eisdem Johanne et Roberto felonice ceper', asportaver' & abduxer', &c. in domini Regis nunc contempt' et grave damnum ipsius Gulielmi et contra form' stat', et unde idem Willielmus qui tam &c. quer' quare cum quidam malefactor', &c. ut prius.

Upon not guilty pleaded a verdict was found for that the plaintiff had declared only for 67l. *ut de denar ipsius Willielmi propriis*, but it does not appear by the declaration that the twenty guineas were the money of the plaintiff; for though they were in the possession of his servant, which when the master is present, is sufficient to shew that they are the master's money, for the possession of the servant is the possession of the master, where the master is present, yet it is not of consequence that they are the money of the master who was absent, and therefore intire damages being given, it will be bad *in toto*.

Afterwards the Chief Justice said, that all the Justices were agreed that the plaintiff must have the property in the money of which the robbery was committed; and he and TRACY thought that it did not appear here that he had the property in the twenty guineas.

But BLENCOE and DORMER being of the contrary opinion, judgment was arrested.

Thomlinson *ver.* Arriskin. In C. B.

Case 167

TRESPASS for taking away and detaining the wife for four months against the consent of the plaintiff her husband, *per quod consortium amisit, &c.* The defendant after imparlance quod vi et armis pleaded *not guilty*, quod resid' form.

U

[329]

resid' transgr' dicit action non, &c. quia dicit quod transgr' præd' unde præd' quer' superius se modo quer' fact' fuit tam per ipsum def' quam per quendam Hug' Martin, quodque post transgr' præd' et ult' contin' viz. 27 May 5 Geo. the plaintiff, defendant and *H. Martin* submitted to the arbitration of *R. Wallas, H. Wallas, and H. Richardson*, ad arbitrand' de transgr' præd' inter quer' & eisdem def' & *H. Martin*, & de diversis fact' inde inter eos tunc penden', & illi primo Jun' 5 Geo. arbitraver' quod defen' et *H. Martin* solverent quer' aut offerrent *to his use* 7l. super tertium diem Jun' ac duas integr' tertias part' omnium castag' ipsius quer' in et circa fact' præd' solubil' tam attorn' quam ballivo suis postquam billa inde produat' foret, &c. quas 7l. *they tendered on the 3d of June and the plaintiff refused.*—To which the plaintiff demurred, and shewed for cause, that the plea was pleaded in bar of the action, whereas it should have been *in barram ulterior' manutention' action' ill'*, and the defendant joined in demurrer. And it was insisted for the plaintiff,

First, That this award is not a bar, for that the submission was only *de transgr' inter quer' et defen' et quendam Hug. Martin et de diversis fact' inter eos tunc penden'* which could not extend to a suit against the defendant only; and and though it is averred, *quod transgr' unde quer' se querit' fact' fuit tam per Hug. Martin quam per defen'*, that is impossible, for though *H. Martin* might have been aiding to the defendant, and in trespass all are principals, and may be charged either jointly or severally, yet the declaration charges the defendant for a particular fact of his own, viz. that he took the plaintiff's wife & *per quatuor menses detinuit et adhuc detinet*, and the detainer by the defendant could not be committed by *H. Martin*; therefore the suit against the defendant for that fact could not be a suit *inter eos dependens*.

Sed non allocatur; for the submission shall be construed to be of all actions between them, or any of them.

Award to
pay costs
uncertain.
2 Salk. 790.
3 Lev. 188.
1 Lev. 58,
133.
3 Lev. 18.
413.
Sid. 358.

[330]

Secondly, It was insisted, that the award being, that the defendant should pay two thirds of all the plaintiff's costs to his attorney or bailiff *in circa fact' præd'* is altogether uncertain; for though an award to pay costs, to be taxed by the prothonotary, has been allowed, 1 Sid. 358. yet here no person is named who is to tax the costs; and therefore an award to pay costs of suit in an inferior court is void. 1 Salk. 75. And here it is to pay costs to the bailiff; and therefore is like the case in 3 Lev. 413. to pay all reasonable expences in such a suit, which was held to be void.

Sed

De Term. S. Mich. 6 Geo. 1.

Sed non allocatur ; for an award to pay costs in such a suit is sufficient, without saying any thing more, for they may be ascertained. Vide 2 Vent. 242. 3 Lev. 18.

Thirdly, The award is one side only ; for it directs, that 7l. and costs shall be paid by the defendant, and directs nothing as to the plaintiff, nor does it say, that all suits, &c. shall cease, or that this shall be in satisfaction of the plaintiff's demands, or any thing to that effect ; and though an award, which expresses that it was made *de et super premissis*, may be construed to be made in satisfaction of all differences or demands, yet this, being only averred by the plea, shall not be construed in such manner.

Sed non allocatur ; for here the award is a parol award, in which the very words need not be expressed, but the effect and substance of it ; and therefore when it is said *quod arbitrat' de & super præmissis arbitraver et determinaver'*, it is tantamount to saying, that the arbitrators for the conclusion of all differences between the parties accorded, &c.

And therefore judgment was given for the defendant.

Wall *ver.* Fulwood & al'. In C. B.

Case 168

TRESPASS, quod 19 Sept. 3 Geo. *Defendants* An argumentative plea not good.
vi et armis un' spadon' quer' absque causâ rationabili ceper', percusser', fugaver' et impercaver', et spadon' sic imparcat' per spacium trium dierum detinuer', necnon 20 Sept, 3 Geo. un' al' spadon' quer' ceper et abduxer'.

The defendants quod vi et armis, necnon tot' transgr' in nar' præd' mentionat' præter caption', percussio', fugation' et impercation' un' spadon' super 19 diem Sept. et spadon' sic imparcat' per spacium trium dierum detention', non cul'; et quod un' spadon' ipsius quer' caption', percussio', fugation' et impercation' et spadon' ill' sic imparcat' per præd' spacium trium dierum in nar' præd' mentionat' per eosdem defen' fieri supposit' dicunt quod ante præd' tempus quo, &c. Ricardus Fulwood was seised in fee of *Chester Close*, and that for damage-feasant there the defendants, spadon' præd' ceper, &c.

[331]

Plaintiff replies, That he is rector of *Renslinch* in the county of *Worcester*, of which rectory a messuage and fifty acres of land are parcel; that in the parish of *Renslinch* quidam campus existit consisten' in part' de terr' arabil'

De Term. S. Mich. 6 Geo. 1.

bil' in part' de prato vocat' Westfield de quo Chester Close in quo, &c. is parcel; that the rectors of the said rectory, have time out of mind had right of common in that part of *Westfield* called the arable part, of which *Chester Close*, in quo, &c. is parcel, pro omnibus averiis coi'nabil' in et super Mess' et quinquagintâ acr' præd' levan' et cuban' in quolibet anno quo campus præd' cum grano in debito tempore secundum consuetud' agricultur' ibidem seminat' fuit a tempore quo tot' gran' sic seminat' asportat' fuit' quosque aliqua pars campi præd' cum grano refeminat' fuit', & in anno quo jacet friscus et ad Ware& per tot' ann' ill', quod anno tertio Geo. præd' Westfield in part' vocat' pars arabilis inde cum grano seminat' fuit et ante præd' tempus quo, &c. nullum gran' in eodem campo remanen' fuit per quod quer' posuit spadon' præd' super Mess. & quinquaginta acr' terr' præd' levand' et cuban' in Chester Close ad co'ia sua ibidem utenda, &c.

Defendant rejoined, quod sex acr' terr' vocat' Pratts Nathan prope *Radford Bridge* sunt parcel' de Westfield, et anno secundo Geo. cum grano seminat' fuer et tempore quo, &c. duo carectat' viciar' eodem anno secundo seminat' fuer' remanen' in præd' sex acr' terr', et duob carectat' ill' sic remanen' quer' de injuriâ propriâ posuit præd' spadon' in Chester Close præd'.

To which the plaintiff demurred, and defendant joined in demurrer.

Lilly's
abr. 433.

[332]

Plowd. 81.
Co. Lit.
126.
19 Hen. 6,
1.

And it was insisted, that the rejoinder was bad, for that the rejoinder ought to answer to the replication which prescribed for common in *Westfield*, of which *Chester Close* in quo, &c. is parcel' a tempore quo tot' gran' asportat' fuit quousque aliqua pars campi præd' refeminat; if the defendant would not traverse the prescription, but only the time of using his common, he should have denied quod tot' gran' asportat' fuit; upon which the issue would have been well joined; or afterwards upon such an inducement as this should have traversed *absque hoc quod tot' gran' fuit asportat*; for the issue was upon the affirmative and the negative, and one ought to commensurate to the other, but here the denial of the defendant is not so.

Secondly, The rejoinder of the defendant is not a direct denial of the matter alleged by the plaintiff, but by inference; the plaintiff says, that all the grain was carried off the ground: The defendant says, that *Pratt's Nathan*

De Term. S Mich. 6 Geo. I.

Nathan was parcel of the field where two lands of vetches remained; this is evidence, and by consequence infers, that all the grain was not carried, but this is not a direct negative to the matter alledged by the plaintiff; and a plea which is argumentative is not good. Co. Lit. 303. Dy. 357. b. Yelv. 223.

1 Danv.
abr. 235.
2 Lill. abr.
433.
2 Lill. abr.
304.

Thirdly, If this is a negative to the plaintiff's affirmative, then the defendant ought to have concluded to the country: for when there is a direct negative and affirmative, there is a full issue, and the conclusion ought to be to the country. Yelv. 137. 2 Saund. 190, 1337.

Fourthly, The plaintiff cannot answer any thing to this rejoinder, for if he says, that two lands of vetches did not remain upon *Pratt's Nathan tempore quo*, &c. this would be a departure; for by his replication he had said that all the grain was carried out of all the field, now that it was carried out of one part only; and if it were found that the two loads of vetches were carried, this verdict would be immaterial, for there may be grain growing on other parts of the field.

[333]

Mudge ver. Mudge. In C. B.

Case 169

THE following case was referred by the Lord Chancellor to the Judges of the Common Pleas for their opinions.

First, If any and what estate arose to *Joan Mudge*.

Secondly, If the covenant was a binding covenant.

Edmund Mudge by indenture 30 January 1692. between himself on the one part, and *Joan Mudge* his wife of the other part, for natural love to the said *Joan Mudge* his wife, by these presents doth give, grant and confirm unto the said *Joan Mudge* all that his fourth part of *Averges*, &c. part of the manor of *King's Barswell* in the county of *Devon*, for and during her natural life, and after her decease unto *William Mudge* his son, and to his disposing, all that his right, &c. in the premisses, that he the said *Edmund Mudge* standeth seised and possessed of an inheritance in fee-simple; but if it happen that the said *William Mudge* die without issue, then the inheritance shall remain to *Joan Mudge* and her heirs, to have and to hold the said granted premisses unto *Joan Mudge* for life, and after her decease to *William Mudge*, and to his disposing; but if he happen

A covenant tho' good in its creation, may be extinguished afterwards by the death of the covenantor, to whom the covenantee was heir.

to

to die without issue, then to *Joan Mudge* his wife and her heirs, to be holden of the Chief Lord of the fee.

[34]

And the said *Edmund Mudge*, for himself, his heirs and assigns, doth covenant and grant to and with the said *Joan Mudge* his wife, and *William Mudge* his son, their heirs and assigns, that the said *Edmund Mudge*, notwithstanding any act, &c. is, and at the time of executing of an estate of the premisses unto the said *Joan Mudge* his wife, and to the said *William Mudge* his son, and their heirs, shall be seised of the demesnes as of fee, to them and their heirs, of and in the premisses, without any use, &c. to alter, &c. and shall continue and be so seised thereof, until an estate of and in the premisses shall be lawfully executed unto the said *Joan Mudge* and *William Mudge* their son, and their heirs; and that the said *Edmund Mudge* now hath good right and title, &c. to convey, &c. and that the said *Joan Mudge* and *William Mudge* shall and may from time to time quietly enjoy, and without the lett, &c. and that the said *Edmund Mudge*, his heirs and assigns, shall and will, at the costs of the said *Joan Mudge*, and *William Mudge*, their heirs and assigns, at any time in five years do any further, &c. for the better assurance, &c.

Co. Lit.
112.

It was insisted, that this amounted to a covenant to stand seised to the use of *Joan Mudge* for her life; for though a man cannot covenant with his wife, yet this deed shall be construed to be a deed poll, as was held 4 Mod. 261. Cas. Parl. 140. Then when a man by deed poll covenants with his wife, and *William Mudge* and his heirs, though the covenant be void as to the wife, it shall be a good covenant with *William Mudge* the son, with whom the father might make a covenant. So if a covenant be entered into with a man and his wife, the husband may declare upon the covenant to him only; and by the same reason the covenant here made with the wife and the son shall be construed to be a covenant with the son only. 2 Cro. 383. 2 Mod. 217.

Then if *Edmund Mudge* by deed poll covenants for himself and his heirs, with his son and his heirs, that he grants, releases and confirms the tenement in question to the use of his wife for life, and after to his son; and if he dies without issue, to his wife and her heirs; and covenants, that he is seised, and will continue to be seised till an estate be executed to them and their heirs; this shall be construed as a covenant to stand seised, &c. for it is evident, that the estate was intended for the wife, &c. and words which cannot otherwise

De Term. S. Mich. 6 Geo. 1.

otherwise take effect, shall amount to a covenant to stand seised. 3 Lev. 370, 372., 2 Lev. 226. 2 Jon. 105.

But on the other side it was insisted, that this was intended as a grant, and being a void grant, the covenants afterwards that he was seised, and for quiet enjoyment, and further assurance, shall not be construed as a covenant to stand seised. 3 Lev. 306. [335]

And it was agreed by all the Judges of the Common Pleas, that no use arose to *Joan Mudge* by this deed.

And as to the covenant, they all delivered their opinions, that the covenant was good in its creation, but afterwards by the death of *Edmund Mudge* was extinguished, the covenantee being the heir of the covenantor.

Sir Edward Bettison, *versus* Savage.

Case 170

A PROHIBITION was granted to the ecclesiastical Court, Upon a writ upon a libel there against the plaintiff, and some other of enquiry justices of the peace in the county of *Kent*, for a disturbance made by them in the parish church of *Chislehurst*, in executed after judgment by default in prohibition, the time of divine service; upon a suggestion, that the plaintiff acted as a justice of the peace in suppressing a riot made by several persons in the said church, for which plaintiff shall have the rioters were indicted at the *Kent* assizes, and found his costs. guilty.

And after declaring in prohibition, the defendant, *quoad* any proceeding since the writ of prohibition delivered, pleaded not guilty, & *pro consulto habend*, demurred; and judgment for the plaintiff upon the demurrer; and upon a writ of enquiry for the damages in that issue the jury found 2d. damages.

And it was now moved by Serjeant WHITAKER, that the plaintiff in prohibition recovers damages, he shall also have costs. 1 Roll. 516, 575. Cro. Car. 559. 1 Jon. 447.

If issue be joined, whether the defendant has proceeded since the prohibition granted, and verdict be for the plaintiff, the plaintiff shall have damages. 2 Jon. 128. Ray. 387. 1 Vent. 348, 350. It was resolved that the plaintiff in prohibition should have his costs where the judgment was by default, and 100l. damages found thereupon in *Ireland*, and though it was said by the Court, that it was not usual after judgment in prohibition to proceed to execute [336]

De Term. S. Mich. 6 Geo. 1.

^a Inst. 664. execute a writ of inquiry, yet it is admitted, that if a writ of enquiry be executed, and the jury thereupon give damages, the plaintiff shall have his costs.

And it appears by the case in C. B. Pasch. 5 W. & M. that where a writ of inquiry was executed after judgment by default in prohibition, that in such case the plaintiff shall have his damages and costs. 3 Lev. 360.

And the Court was of opinion the plaintiff should have his costs, and a writ of error was brought in the King's Bench, and judgment affirmed, and afterwards a writ of error in parliament; but there was no proceeding thereupon, upon my persuasion that it was reasonable and agree the authorities in law, that the plaintiff should have costs.

Termino Pasch.

6 Geo. 1. In C. B.

Scott *versus* Alberry. Intr. Trin. 3 Geo. Rot. 1153. Case 171

EJECTMENT upon the demise of *John Scrape* for A devise of
lands in *Walthamstow* in the county of *Essex*. all his estate
whatsoever

The defendant pleaded not guilty, and at *Essex* assizes before Justice Powis a special verdict was found to this effect; That *James Scrape* was seized in fee of the lands in question, being copyhold held of the manor of *Waltham Holy-cross*, and 5 June 1693 made a surrender in the court of the said manor, *ad tales usus intention' & proposita qual' fuer' aut forent per testament' & ult' voluntat' suam in script' limitat' declarat' & express'*; that he made his will 16 May 1694, and thereby devised in these words, "As touching the worldly estate it hath pleased God to bestow upon me, I give the same in manner following. Item, I give to my cousin *Thomas Scrape* all that my parcel of land lying in *Waltham-Abbey* (being the lands in question). Item, I give to my cousin *Thomas Scrape* my wearing apparel, linen, books, with all other my estate whatsoever, wheresoever not herein before given and bequeathed, and him the said *Thomas Scrape* I make the sole executor of this my will for performing the same.

Thomas Scrape was admitted, and afterwards devised to the lessor of the plaintiff and his heirs, and if *Thomas Scrape* by this devise had an estate for life or in fee, was the question.

[338]

And the court took notice that by this special verdict it is not found that the defendant had any title as heir at law or otherwise, and then the lessor of the plaintiff being admitted, he ought to recover against him that had no title.

And this was admitted by the counsel for the defendant, and therefore he would have moved to amend, but was restrained by this doubt in point of law.

And

De Term. Pasch. 6 Geo. 1.

And therefore the court heard counsel as to the question on the will; and Serjeant SELBY argued, That *Thomas Scrape* had by this devise an estate in fee; for it appears that the testator intended to dispose of all his estate; as to the worldly estate, &c. "I give the same as follows," and though a devise to a man generally passes only an estate for life, yet when the devisor adds, that he intends him all his estate whatsoever and wheresoever, this carries him a fee. Where a man devised all his estate to his wife, it was adjudged she had a fee. 1 Rol. 834. §. 12. So 3 Mod. 45. So in the case of the Earl of *Bridgewater* ver. the Duke of *Bolton*, a devise of all his real and personal estate was held a fee. 1 Salk. 236. So in *Hopewell* and *Ackland*, 1 Salk. 239. The devise was of his manor of *B.* if his daughter died without issue, to his brother and his heirs. "Item, I give to my brother all my lands, tenements and hereditaments. Item, I devise all my goods, chattels, money, debts and whatsoever else I have in the world not before disposed of, to my brother *A.* paying my debts and legacies;" and though the last clause was coupled with personal things, yet it was resolved that these words, *whatever else I have in the world*, gave the fee and inheritance of all his estate.

[339] To which the counsel for the defendant answered, that the cases mentioned were consistent with the present case, though the devise to *Thomas Scrape* should be construed only an estate for life; for by the case 1 Roll. 834. it appears, that the devise was of all his estate to his wife, paying his debts and legacies, and that his debts amounted to 40l. and his personal estate but to 5l. and then without doubt it would be a devise in fee. So the case 3 Mod. 45. was, that *J. Reeves* by his will said, "I hear *J. Reeves* is inquiring after my death, but I am resolved to give him nothing but what his father hath given him by his will; I give all my estate to my wife;" and the resolution in this case was founded upon the antithesis in these words, "I am resolved to give nothing to *J. Reeves*, who probably was his heir at law. So in the case of the Earl of *Bridgewater*, 1 Sal. 236. Mod. Ca. 106. The court took notice of the words "all my estate real and personal;" for *Holt* said, the word *estate* is *nomen generalissimum*, which is subdivided into two species, real and personal; and therefore when he enumerates both species, though the words are

De Term. Pasch. 6 Geo. 1.

are conjoined with personal things, all passes; but there it seems to be agreed, that if the estate had been mentioned generally, being coupled with chattels only, nothing would have been comprised but personal estate.

And therefore the case Cro. Car. 447. was urged by the counsel for the heir at law; where a man devised all the residue of my goods, leases, mortgages, estates, debts, household-stuff, bonds and other things whatsoever of which I am possessed, to my wife; and it was resolved, that his mortgages in fee past to her but for life; and this case was agreed to be law, for the word estate was mentioned without the difference of estates, as here. Mod. Ca. 108.

So the case of *Hopewell ver. Ackland* was founded upon this reason, that the testator had given to his brother "all his goods, chattels and debts," which comprehend "all his personal estate;" and therefore when he adds, "whatsoever else I have in the world," that imports something more than his personal estate; and there he devises many legacies in fee for charities, and therefore when he devises to his brother, he paying his debts and legacies, it was probable he intended the inheritance for him, who was to pay the charities for ever.

And therefore it was urged, that the present case went farther than the case mentioned; for here he gives only his apparel, linen, books, with his other estate, which must be construed with his other estate of the same nature, and not an estate of a higher nature; as in the case 2 Co. 46.

Monasteries, colleges, &c. surrendered or forfeited, or which by other means should come to the crown did not extend to those which came afterwards to the crown by act of parliament. So colleges, deans and chapters, &c. and other ecclesiastical persons, by statute 13 ELIZ. Ca. 10. does not extend to bishops.

Then here the estate was copyhold, which passes by the surrender, not by the will; and when he surrenders to such uses as should be declared and expressed by his will, and in the clause by which he devises the copyhold, he gives it to *Thomas Scrape* only, without saying any thing of his heirs; it would be a forced construction, that the words, "with my other estate not before bequeathed," should enlarge the estate before expressly limited to *Thomas Scrape*; and after these words he adds, "and him I make my executor for performing my will," which words import, that he intended

Words which pass a fee.
Cowp. 301.
2 Vern. 690.
Forrest 157
268.
Will. 333.
2 Atk. 37.
3 Burr. 1618.
Alleyne 28.
Atk. 486.

[340]
Cro. Jac.
58. Raym.
62. Hardr.
155. 442.
2 Inst. 137.
457. 478.
629. 1 Le-
on. 277.
Dyer 109.
pl. 38.
Godb. 395.
Latch. 89.
3 Co. 82. b.
9 Co. 117.
118. Goldf.
171. pl.
102. Godb.
395.
Jones 186.
Dyer 109.
pl. 38.

De Term. Pasch. 6 Geo. 1.

ed nothing for him by this clause, except such estate as belonged to an executor.

But the court held, that when he gave all his estate whatsoever, that comprehended all that he had, real or personal estate; and when he had surrendered to the uses declared by his will, the will shall have the same construction as if it had passed the land it self. *Adjornatur.*

Cowp. 299.

But afterwards the plaintiff was admitted to take judgment. Vide Vern. 690. Cas. Tem. Talb. 157. 12. Mod. 592. 3 Wils. 415. 3 Cro. 447, 449.

[341]

Case 172 Wagstaff *ver.* Rider and Travell. Intr. Trin. 5 Geo. Rot. ——— In C. B.

This action is a liberal one. Vide 2 Burr. 906, 1011, 1012.

No one can maintain an action on the case for inclosing common but those who have a particular right, or shew special damages; and tho' he hath special damage, he hath no right to his demand, without alleging a prescription.

Carth. 191.

1 Show. 243.

3 Mod. 289.

1 Salk. 12,

16. 2 Jones

157. Cro.

Cav. 132.

266. &c.

Vaugh. 341.

Mod. Cal.

307. 1 Leon

141. 1 Inst.

113. 166.

IN an action upon the case the plaintiff declared, Quod cum idem quer' tertio Maii 1713. fuisset & adhuc est possessionat' de & in uno messuagio in Newport, ac ratione inde per tot' tempus præd' habuit & de jure habere debuit communiam pastur' in quodam communi campo vocat' Buryfield pro dobus spadon' a tertio die Maii usque fest' Sanct' Mich' prox' solvend' pro quolibet spadon' 1s. 8d. proprietar', firmar' vel occupator' ejusdem campi; cumque præd' campus vocat' Buryfield contigue adjacet al' campo vocat' Pitwellfield, cumque defend' dicto tertio die Maii fuerunt & hucusque sunt tenen' & occupator' præd' communis campi vocat' Buryfield, ac ipsi & omnes al' tenen' & occupator' præd' campi vocat' Buryfield, a tempore, &c. reparaver' sensur' int' Buryfield ne averia personar' in Buryfield communiam habentium evaderent in Pitwellfield & exinde in terras adinde adjacent', prædicti defend' prædicto tertio die Maii & abinde hucusque sepes int' Buryfield & Pitwellfield permiser' fore in decasu, per quod duo spadon' ipsius quer' quarto die Maii 1713. & abinde hucusque inter præd' tertium diem Maii & Mich' quolibet anno diversis diebus & vicibus depascen' & communia sua præd' in formâ præd' uten' e Buryfield in Pitwellfield præd' & abinde in al' campos diversor' personar' prope adjacent' evaser' & damnum ibidem fecer', &c. To this declaration the defendants pleaded quod non fuer' tenen' seu occupator' præd' campi vocat' Buryfield. To which the plaintiff demurred, and shewed for cause, that this was a plea amounting to the general issue; and the defendants did not maintain their plea, but took exceptions to the declaration, that the plaintiff did not shew

shew any title to common by prescription, but only says, *habuit & habere debuit communiam pasturæ, &c.* for though this is sufficient in an action on the case by one who has right of common against a wrong-doer, yet when the plaintiff charges the defendant for nontenance of a thing against common right, it is not sufficient to say the defendant ought to do it, but by what right he is bound to do it; as in an action upon the case for not repairing fences, it is not sufficient to say, *quod def^s reparare debet*, but the plaintiff must alledge an express prescription for the repairs; and so it was resolved 1 Salk. 335. Star. *ver.* Rookesby. And though here a prescription were alledged for the defendant to repair the fences between *Buryfield* and *Pitfield*, yet this prescription runs only between the owners of those two fields; the owner of *Pitfield* may demand, that the defendant shall repair the fences between him and *Buryfield*, but the plaintiff who has common in *Buryfield* cannot demand it, at least if he has right of common only by licence or contract with the defendant; for it does not appear that he has any more right of common than at the will of the defendant or some other. A commoner cannot have a *curia claudenda*. *F. N. B.* 128. For this action does not lie but for him who was tenant of the freehold, and also tenant of the soil; and therefore the plaintiff here cannot maintain an action of the case against the defendants, without shewing an express lien between the plaintiff and the defendants to inclose the common for the benefit of the commoner. Every one who would maintain an action on the case must have a particular right, or shew special damage. By Holt, Selk. 15. An action upon the case does not lie for the owner of an antient messuage in a vill, who claims by prescription to have a passage in the ferry toll-free, against him who is to repair the ferry; for he has no right to demand it without special damage. 1 Sal. 12. And here the plaintiff, though he hath special damage, hath no right to his demand without alledging a prescription for it.

And afterwards judgment was given for the defendants.

Term. Sanct. Mich.

7 Geo. I.

Gally *ver.* Serjeant Selby. In Canc'.

Case 173

A mortgagor shall not be allowed to present to a living that becomes vacant, because nothing can be taken for it, but shall be looked upon as a trustee for the mortgagor or his grantee, and shall present such person as they shall name.
1 Stra. 403.

CHARLES STAFFORD seized in fee of several lands in the county of *Bucks* and of the advowson of *Warrenden* in gross, by lease and release 23 and 24 April 1696, conveyed the lands to trustees and their heirs, to raise 500*l.* for *Samuel Stafford* his brother and his other brothers and sisters, and afterwards by lease and release bearing date 29 and 30 March 1696 (but executed after the before mentioned conveyance to the trustees for raising portions for his brothers and sisters) conveys the same lands, and by indenture 3 April 1696, conveys the said advowson to Serjeant **SELBY** and his heirs.

10 March 1705, *Charles Stafford* grants the next advowson to *Peter Gally*; in 1706 *Charles Stafford* died, and *Samuel Stafford* exhibited his bill in equity against *Selby* to be let into a redemption of his estate. *Selby* insisted that he was an absolute purchaser; but upon hearing the cause 1707, it was decreed that *Selby* was only a mortgagee, and that *Samuel Stafford* should stand in the place of the aforementioned *Charles Stafford* and should be admitted to redeem, and that *Selby* should account for the profits received by him since the conveyance, and that security should be given to redeem, &c.

[344] 4 July 1709, *Gardiner* articted to pay 18000*l.* for the lands and the advowson, which were conveyed to *Selby*, but the account was not then settled by the master; and now the church being become vacant by the death of *Cowne* the last incumbent, *Gally* the plaintiff, the grantee of the next avoidance, presented his clerk; *Selby* also presented his clerk, and *Gardiner* also presented his clerk. Upon this *Gally* exhibited his bill in equity against *Selby* and *Gardiner*, and *Gardiner* also exhibited his bill against *Gally* and *Selby*,
alleging

alleging that he was a purchaser for a valuable consideration, without notice of the grant to *Gally*.

The bill of *Gally* against *Selby* (*Gardiner* now making default) came on to be heard.

And it was insisted for the plaintiff, that *Selby* was a mortgagee, and was by the former decree to be redeemed; the equity of redemption then being in *Charles Stafford*, he would have been admitted to present to the advowson which became void, pending a suit for redemption, and of consequence his grantee shall be admitted here; for the presentation not being to be accounted for in value the mortgagee shall not be allowed to present, because nothing can be taken for it or accounted for it, but the mortgagor shall present.

And it was agreed that the case would be so in a common mortgage, but it was said that here *Selby* was a purchaser, and continued a purchaser at the time of the grant made of the next avoidance, viz. 10 March 1706, though by the decree after he was directed to account, by which he became in the nature of a mortgagee *quoad* the plaintiff in that suit, viz. *Samuel Stafford*, but not *quoad* *Charles Stafford*, for he was no party to the suit, therefore as to him purchase continued absolute; then the plaintiff *Gally*, who took nothing from *Samuel Stafford*, nor claimed under him, nor gave any valuable consideration for his grant, ought not to present; but *Selby* who has the legal interest ought to present without the interposition of a court of equity. But it was decreed by the Lord Chancellor, that *Selby* was only a mortgagee from the beginning, and though *Samuel Stafford* was plaintiff in the suit, yet he came in under *Charles Stafford* who had the equity of redemption, and therefore when the church became vacant he was to have the advantage of presenting, and as he had granted the next avoidance his grantee stood in his place, and *Selby* is only a trustee for him; and it is not material whether he is a purchaser of the grant, or not; for if the grant were without any consideration, it would be good and sufficient to intitle him to the presentation; and therefore it was decreed that the presentation by *Selby* and also by *Gardiner* were void, and that *Selby* should present to such person as the plaintiff should name.

[345]

I was counsel for the plaintiff.

Anonymous.

Case 174

Anonymus. In Canc'.

Upon a settlement of lands to be sold in trust for several purposes, the residue is given to B. and his heirs, reserving only 200l. to be paid to such person as the donor

A MAN seised in fee made a settlement of lands to trustees and their heirs, upon trust that they should sell the lands and pay out of the money arising therefrom such particular sums to such particular persons, and the residue (after the sum of 200l. to be paid to such person as he by any writing under his hand should direct) to B. his executors or administrators, and afterwards died without any direction for the payment of the 200l. It was resolved that B. should not have the 200l. but the heir of him who made the settlement.

should by writing under his hand direct, who died without any such direction, the 200l. will go to this heir, and not to B. or his assigns.

Case 175 *Tasbmaker qui tam*', &c. *ver.* Hundred of Edmonton. In C. B.

An action lies upon the stat. 13 Ed. 1. against the Hundred for a robbery committed on a Sunday, notwithstanding 29 Car. 2. if it appears that the person robbed was only going to his parish church.

[346]
1 Stat. 406.
S. C.

ACTION upon the statute 13 Edw. 1. against the Hundred of Edmonton *de placito quod cum præd' Tasbmaker fuit possessionat' de duobus peciis auri cunit' vocal' Guineas valor' 11. 1s. separatim, ac fuit possessionat' de bonis & catallis sequen' ut de bonis propriis, (viz.) a silver watch, a gold watch and chain, a pair of ear-rings and a diamond necklace, & sic possessionat' existen' quidam malefact' ignot' 10 Apr' apud Edmonton infra præd' Hundred de Edmonton insult' fecit in ipsum Tasbmaker & Juditham uxor' ejus tunc præsen' & præd' two guineas de eodem Tasbmaker & prædicta bona & catalla de præd' Tasbmaker & Juditha uxor' ejus tunc præsen' felonice cepit, &c.*

Upon not guilty pleaded at the trial before KING CH. J. 30 Nov. at *Westminster*, it appeared by the evidence that *Tasbmaker* married the daughter of Mr. *Gould* who lived at *Edmonton*, and had continued with his wife at the house of Mr. *Gould* from the first of March precedent, and that upon the 10th of April, being a Sunday, *Tasbmaker* and his wife, and Mr. *Gould* were in his coach, going from Mr. *Gould's* house to *Edmonton* church, two miles distant, and by the way were robbed, and the goods before mentioned taken from *Tasbmaker* and his wife

And

De Term. S. Mich. 7 Geo. 1.

And it was insisted, that the action was not maintainable since the statute 29 Car. 2. cap. 7. which enacts That if any travelling on the LORD's day be robbed the Hundred shall not be charged for the robbery, &c.

But it was answered, That going to the parish church could not be called a travelling within that statute, which was made for the better observation of the LORD's day, and confirms the statute made for the public exercise of religion, and by the stat. 1 ELIZ. every one is to resort to his parish church on the LORD's day.

But the travelling prohibited by this act was such as tended to the profanation of that day, and the Hundred by the statute is liable to the King, though the party could not have an action where he was robbed on travelling, &c. and therefore the bar to the action was intended as a penalty, but such penalty can never be supposed to be intended against a man who is going to his parish church.

And afterwards upon a motion the court declared, that the action well lay; though perhaps it might have been otherwise if he had been travelling for his pleasure. [347]

East-India Company ver. Atkyns. In Canc. Case 176

THIS was a bill for a discovery of a private trade carried on by the defendant, who was supercargo of the *Stringer Gally*, sent by the company on a voyage to *Canton* in *China* 1715, and from thence to return to *England*, and setting forth, that it was agreed between them and the defendant, that he should go supercargo for the company in the said ship, called the *Stringer Gally*; that he should take several goods from the ship called the *Purston Gally*, and then to proceed to *China*, and there take in goods for the company, &c. and that the defendant covenanted, that he would not use any private trade during the voyage, and that if any bill in chancery should be brought against him, that he would answer thereto, and not plead the acts of parliament which create any penalty or forfeiture in bar to such discovery; and then charges, that he sailed to the *Downes*, and there took in goods for the company from on board the *Purston Gally*, and from thence proceeded to *Canton* in *China*, where he privately sold the company's cargo, and with the produce of such cargo bought other goods, and disposed

A man may waive a privilege, if it is not what the law prohibits; though he is not obliged to discover what will subject him to a penalty. 1 Stra. 163. S. C.

posed of them in his return at *Lisbon* in *Portugal*, and part was carried by the *Succefs*, and part by the *Lemon Gally* to *Holland*, &c. And offering to waive all penalties, &c.

The defendant, as to so much of the bill as seeks a discovery of goods exported without licence, or sold before the return of the ship at *Lisbon* or elsewhere, pleads the statute 9 & 10 W. 3. c. 44. and 6 *Annæ*, c. 3. by which, if bulk be broke before the return of the ship, the ship and goods shall be forfeited, &c.

[348] And Mr. VERNON argued, that this plea was sufficient; for by 9 W. 3. the penalty is the loss of ship and goods, and the double value of the same, one fourth part to the prosecutor, and the other three fourths to the *East-India* company, and therefore though the waiver might be sufficient, as to the part given to them, yet as to the other fourth part of the ship, and double the value, the plaintiffs are not intitled: This they seemed apprehensive of, and for that reason alledge, that they have exhibited informations, without saying when, or for what goods, which they ought to have shewn particularly, and expressly setting forth the informations themselves, to shew they were for the goods in the bill inquired after, if they would have intitled themselves as prosecutors to the other fourth part; but if they should be intitled to the forfeitures upon 2 W. 3. c. 44. yet the forfeiture by 6 *Annæ*, c. 3. is given, one moiety to the crown, and the other to them who will sue or shall seize, &c. wherefore to this penalty they appear not to be intitled; and then we are in the common case, where a discovery is prayed which will subject the defendant to a penalty, in which case the court will not oblige the defendant to answer; a court of equity will not subject persons to penalties, for it relieves against them.

But it is said here the defendant covenants to answer to any bill in equity, and not to plead or demur; but such covenants are of dangerous consequence, and here will subject the party to the payment of 90l. per cent. to the company by way of damage, (for so the covenant runs) which is a mulct as great as the forfeiture.

The manner of obtaining it was hard; when the defendant was ready to set sail, he must then execute this charter-party, or not go. But this is said to be no more than what the company has always practised; yet there is also a covenant, that if the ship miscarries the party shall lose
his

his wages ; which as often as brought into question has been set aside, for they are intitled from port to port to receive wages, to such port where the cargo was unladen, and such covenant is unreasonable.

No consideration is pretended for this covenant, but the company's undertaking that they shall not be subject to any forfeitures, which the company is not able to make good. [349]

The person covenanting here doth not pretend or pray to have relief against his covenant ; but the plaintiffs would have a specifick performance of it, which is not so proper in a court of equity ; for a difference hath always been taken between a circumstance of fraud to be relieved against a covenant, and the praying a specifick performance of it. If a man makes a mortgage, and covenants not to bring a bill to redeem, nay, if he goes so far as in *Stiffed's* case, to take an oath that he will not redeem, yet he may redeem.

If a man borrows money, and covenants, that if the interest be not paid at the day, it shall carry interest, yet a court of equity will relieve ; though he may be said as much to waive the benefit of a court of equity in those cases as here.

It is indeed a covenant of an extraordinary nature, that he shall not make part of his defence ; if he may be abridged of one part of his defence, why not of the whole.

Indeed, in a covenant to suffer a common recovery, it is agreed what defence shall be made, and what the parties shall do ; and if this be allowed, the defendant may another time be obliged to make default, that the bill may be taken *pro confesso*.

The covenant is, that the defendant shall not plead nor insist on the penalties, to avoid a discovery. But suppose he does, is the court bound ? Will they refuse to regard his plea, and pass over the merits which the law allows him to insist on ? What has a court of equity to do with a covenant, unless it be executory, to pray a specifick performance of it, but can there be a specifick performance here ?

The defendant covenants not to plead this matter, but he has pleaded it ; the plaintiffs may take what advantage they can at law, but a court of equity will not interpose, especially to do what is contrary to the design of a court [350]

of equity, (viz.) to relieve against forfeitures and penalties.

The rule, that no person shall be compelled to subject himself to penalties and forfeitures, is founded on natural right and justice: It is a rule which hath been observed inviolably without exception, till this attempt; therefore, as we cannot be acquitted by the company from these forfeitures, it would be a monstrous thing in a court of equity, to subject us to them; and the rather, where it is a strain upon the allegation of the plaintiffs, who alledge, that they are apprehensive of an injury from the defendant, though the proceedings shew that they never made a better voyage, having gained 200l. per cent. profit. Their whole complaint is conjectural and groundless, and seems to have no foundation, and hath no oath to support it.

If they have any ground, they have their remedy at law, and the defendant asks no relief in equity against the covenant.

Sir THOMAS POWIS on the other side argued, that the defendant was not within the penalty of 9 W. 3. which prohibits all persons except the company, and their servants or agents, to trade or carry goods to the *Indies*; the defendant is the servant of those who may trade, and so not subject to the penalty of that act.

But if, in respect to those goods exported, they be looked upon not as servants, but as traders, and so within the penalties of the act;

[351] Yet three fourths of the penalty being given by that act to the company, and the other fourth to the informer, they may alledge they have exhibited an information, whereby they will be intitled to that fourth, and then waiving the benefit of the penalties they are intitled to, they are in the common case; as where a person waives the forfeitures of the treble value, and prays a discovery of tithes; or where a man waives the penalty of the statute, and prays a discovery of timber felled. And if the penalties of this act can be waived, and a discovery of the outward-bound voyage prayed, then the plea, which covers the discovery of this, is all.

As to the discovery prayed by the bill in relation to the homeward bound voyage, that stands upon the statute 6 *Annæ*, c. 3. where the moiety of the penalty is given to the crown, which therefore will stand upon the covenant of the defendant, not to insist on this matter by way of plea.
And

And may not a man covenant not to commit a fraud, or to discover it when committed?

It is founded on the consideration of being admitted to the benefit of all the profits he may be intitled to as supercargo; so that it is a lawful covenant, and founded on a consideration. Then it is a covenant that goes along with a trust, and such a trust as none would commit to another, unless he could come to the knowledge how it is performed; but it cannot be known without the discovery of the defendant, it is a transaction in a ship at sea.

A mortgage is in its nature redeemable, and therefore a covenant not to redeem is unlawful. So is a covenant to pay interest upon interest, for simple interest is a reasonable compensation; but this covenant hinders no one of his right, but only tends to prevent the defendant from defrauding the plaintiffs.

It is said a man hath a right to plead or demur, but may he not waive such right? may he not covenant to give judgment by default, to release errors, to suffer a recovery by default, and will not a court of equity compel the performance of these?

LORD CHANCELLOR: The plaintiffs shew not when any information was exhibited, or for what, but the defendant must take their word for it; if a person pleads a former suit depending, he must shew when and for what, that the court may see it is for the same cause.

But as to the covenant it must be considered, that it is in a case where it is morally impossible to get a discovery but from the defendant himself, and it is the more reasonable to get it, since it relates to a fraud where the plaintiffs are prejudiced by the defendant, and ought to have amends; and the defendant had an opportunity of doing the wrong by reason of the trust reposed in him by the plaintiffs. It is not a covenant to restrain a court of justice from doing right, but enables it to do right, for it causes the whole truth to be laid before the court.

And there is a difference between a defence upon an answer and a plea.

The plea is not a defence to the justice of the cause, but to the inquiry, that the defendant may conceal the truth, therefore not like the case of a covenant not to redeem a mortgage.

It is a negative privilege which the law allows, that a man is not obliged to discover what may subject him to a penalty,

De Term. S. Mich. 7. Geo. 1.

penalty, but it is not a natural right, for then a discovery, if he pleased to make it, would invade that right; but sure a man may waive such a privilege, it is not what the law prohibits, but the other party hath no right to oblige him to it, but if he will discover he may, there is no law or right against it.

[353]

If the defendant hath not acted against his duty, his answer does him no harm, and why should the court protect him if he hath played the knave? Though the law doth not oblige any one to subject himself to penalties, yet he may if he will, if he thinks it for his advantage. Remedy at law is vain where there can be no proof, and the bill is to discover what goods were carried, for that is the measure of their damage.

The plea over-ruled.

N. B. There was afterwards an appeal to the House of Lords, but the matter was compounded.

Case 177 Fowler *versus* Blackwell & al'. In C. B.

No one shall take age without a wife to him.

IN EJECTMENT tried at *Essex* assizes before Justice Eyre, upon the demise of one *Edward Pate*, the case was this: *Richard Warner* seised in fee of the lands in question had two sons *Richard* and *George*, and by his will devised in these words, (*viz.*) *I give to my wife Jane all my freehold lands in Canenden in the county of Essex*, (being the lands in question) and after some other bequests he says, *I give to my son George my freehold lands in Canenden after my wife's decease; and if it shall happen that my son George should die before he attain the age of 21 years, then the said lands shall descend to my son Richard and his heirs for ever; Richard* was the eldest son and heir of the testator, *George* was his younger son by a second wife; *George* attained his age of 21, and by his will devised the lands to his sister, the wife of the defendant, and her heirs, and then died in the life of *Jane* his mother.

The lessor of the plaintiff claimed under *Richard*; and it was referred to Mr. Justice EYRE, whether *George* had an estate in fee or only for life; and it was insisted that *George* took a fee, for if he had only an estate for life he took nothing, and the devise that *Richard* his heir should take if *George* died under age, imports that he should not take if he did not die under age; and so was the opinion of *Saunders*

De Term. S. Mich. 7 Geo. 1.

ders 2 Saund. 388. Devise to the heir after the death of B. gives an estate to B. by implication. 13 H. 7. 13. b. Dal. 44. 3 Lev. 55. Vau. 262.

But by J. EYRE here is no devise to the heir of George, and no one shall take against the heir without an express devise to him. [354]

Judgment for the plaintiff.

Pickering *ver.* Appleby. In C. B.

Case 178

ASSUMPSIT, for 58ol. for ten shares in the stock of the governors and company of the *Copper-mines* in England, transferred and sold by plaintiff to defendant.

And there was another count in the declaration for goods and merchandises sold and delivered.

And another count, that the defendant, in consideration that the plaintiff took upon himself to deliver and transfer ten shares of the said stock to the defendant the next transfer day, *super se assumpsit solvere* 58ol. *super translatione* inde, &c.

The defendant pleaded *non assumpsit*; and upon the trial there was proof made of a contract for ten shares of the said stock for 58ol. But there was no memorandum in writing of the contract or any earnest paid; and there was a doubt upon the words of 29 Car. 2. whether the plaintiff should recover. The statute says, That no action shall be brought to charge any person upon any agreement in consideration of marriage, or upon any contract for sale of lands, tenements or hereditaments, or any interest in or concerning them, or upon any agreement not to be performed within the space of one year from the making, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised; and in another clause, No contract for the sale of any goods, wares and merchandises for the price of 10l. or upwards shall be allowed to be good; except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some memorandum or note in writing of the said bargain be made and signed, &c. as above.

Whether a contract for ten shares of stock, is within the Stat. 29 Car. 2. ca. 3. which enacts, That no action shall be brought upon any contract, not to be performed within the space of one year, unless such agreement or memorandum be in writing, and signed by the party, &c.

[355]

And upon the trial before KING C. J. it was doubted, whether the shares in the stock of this company were within the purview and intent of that statute; and therefore it was made a case, and argued before the court of Common Pleas; and afterwards at *Serjeants-Inn* before all the Judges of England.

And I insisted at the *Serjeants Inn*, that the words of the statute extend to all contracts for the sale of goods, wares or merchandizes, and shares in such a corporation are merchandize. *Merx est quicquid vendi potest*; every personal thing for which merchants traffick may be called merchandize.

Where Trover lies.

2 Salk. 666.

667. C. rib.

296. 1 Blac.

Com. 127.

425. 2

Blac. C. m.

402.

Sumner's

case, Lord

rep where

by negroes

2 ed. clar-

ed to be fr-

from the

instant they

land in Eng-

land

Ld. Raym

3274. 2

[356]

Cro. 638.

Cro. C. m.

262. 1 Roll

5, 10. H. ad

11. 4 Mod

356.

Trover lies for muscheats, monkeys, parrots, for they are merchandize. 2 Cro. 262. 1 Bulst. 95. And for negroes, for the same reason. 2 Lev. 201. 3 Lev. 366.

And though there was a doubt whether Trover lay in the case of *Smith* and *Gould*, yet the doubt arose only on the nature of the property of a negroe. So the word *goods* is of a large extent; if a man grants *omnia bona sua*, all his personal chattels pass. 2 Roll. 58.

Emblements not served may be levied upon a *Fieri fac' de bonis & catallis*. So Trover lies for a bond, and for letters patent. And the plaintiff may declare, that he was possessed *de bonis & catallis sequen'*, (*viz.*) *uno scripto obligat'*, *uno warranto*, &c. But it cannot be denied, that these shares are personal estate, they may be attached.

If a man trades in them, he shall be a bankrupt; so ruled in B. R. in *Sir John Wostenholm's* case; and though this judgment was declared illegal by the statute 13 & 14 Car. 2. c. 24. that seems to be because *Sir John Wostenholm* did not traffick in them, but only had a stock in the *East-India* company, as any other gentleman might have.

But there the proviso is, that every person who shall trade, traffick or merchandize, in other way or manner than in the said royal fishing, *East-India*, or *Guinea* company, shall be liable to a commission of bankrupt.

And in the 9 & 10 W. 3. c. 44. s. 74 a clause is inserted, that no member of the *East India* company established by that act, shall be liable to be a bankrupt in respect of his stock there only; and that no stock in that company shall be liable to a foreign attachment; by which clauses it appears the parliament thought it reasonable by express words to avoid such a construction, as otherwise might have been made

De Term. S. Mich. 7 Geo. 1.

made concerning persons who traffick in such stocks; for if the man does not traffick, but deals only on a particular occasion, this does not make him a bankrupt.

As if a man provides for the victualling of the navy, 1 Vent. 170. or has a part in a ship, but does not freight it. 1 Vent. 29. 1 Sid. 411.

The intention of the act was to prevent frauds and perjuries, which was equally hazardous in contracts for stock, as for land or any other thing; and therefore the intention of the legislature seems to be aimed at all contracts; if made for lands, by the prior clause it is provided, that the agreement or some *memorandum*, or some note thereof, shall be in writing, &c. and by the latter clause it is provided for in all contracts for goods, wares and merchandizes; in which words it may be well presumed, that all contracts were intended to be included; and it is the more probable that stocks were meant to be included, because traffick in them was used many years before that act.

And in the case of *Nunns against Scipio*, Hill. 8 Feb. 1715. in chancery, it was expressly declared by Lord Chancellor *Cowper*, that a plea of the statute to a bill for performance of a contract for 4000l. S. S. Stock ought to be allowed; which resolution is in point.

[357]

Serjeant *WHITAKER* *e contra* insisted, that all contracts were not intended to be comprised within the statute; for the words make contracts above 10l. void, except the buyer accept part of the goods sold, and actually receive the same, or give earnest, or some *memorandum* of it be in writing; and therefore though one or other part is sufficient, yet the statute does not extend to contracts where neither one nor the other part can be performed; and therefore, where part of the goods cannot be delivered or accepted, it cannot be a contract within the statute, which extends only to such things part whereof may be delivered or accepted.

Transfer of stocks at the time of that statute made was unusual, and therefore it is not probable that the legislature had that in view; and although all goods, wares and merchandizes, are mentioned in the statute, yet it does not follow that the statute shall extend to contracts for all sorts of goods; for there are goods of which felony cannot be committed, and it is not probable that it should extend to them.

This

De Term. S. Mich. 7 Geo 1.

This statute is introductive of a new law, and therefore is to be taken strictly, and shall not be construed to extend to stocks, or other choses in action which cannot be assigned.

To which it was replied, that though the statute says the contract shall be void, unless the buyer accept part of the goods, or give earnest, or there be some *memorandum* in writing; yet it is not necessary that the thing contracted for must, by this statute, be such as can be delivered into the other party's hands; it is sufficient that part of the goods be accepted, or that there be earnest, or some *memorandum* be in writing; and therefore if the goods cannot be delivered, if there be earnest, or a *memorandum* in writing, it is sufficient. If there be a contract for goods to be imported in such a ship, shall not the contract be within the statute, because the goods cannot be delivered till the arrival of the ship?

[358]

But if the delivery of the goods is necessary, the assignment is a delivery; and the declaration says for ten shares *vendit' & translat'*; if an assignment was made it may be accepted, and till acceptance the transfer is not complete; and though it is said, that a chose in action cannot be assigned, yet it does not follow that it is not of the nature of goods of merchandize.

3 Leon.

236. contra.

1 Bac. Abr.

692. See 1

Comy. Dig.

424. where

these cases

in Cro. El.

are said to

be misre-

ported, &c.

A chose in action may be assigned by the King. Dy. 16. 2 Cro. 82, 179. 2 Rol. 198. or may be attached. 3 Lev. 236. Cro. Eliz. 172, 184, 713. 1 Rol. 553. 1 Sid. 327.

But the Judges being divided in opinion it was adjourned. Vide 1 Willf. 118.

Case 179 The King *versus* Bishop of Hereford & al'. Intr. H. 5 Geo. Rot. — In C. B.

In quare impedit bishop pleads, that he claims nothing but as ordinary, held bad for want of alleging notice of the refusal,

IN a *quare impedit* for the presentation to the vicarage of *Aymstry in com' Hereford*, the bishop pleaded, that the vicarage was within the diocese, and that he claimed nothing but as ordinary of the said church; that the king by letters patent under the great seal presented *Geo. Herbert* to be instituted, *super quo idem episcopus ut ecclesiæ præd' ordinari' præd' Geo. Herbert sic præsentat' de habilitat' & idoneitat' suâ tam de moribus quam scientiâ in hac parte secundum*

De Term. S. Mich. 7 Geo. 1.

dum leges ecclesiasticas adtunc & ibidem examinavit ut de jure debuit, & super hujusmodi examination' idem episcopus adtunc & ibidem invenit et per sacrum diversar' personar' fide dign' sibi manifeste apparuit quod præd' Geo. Herbert tempore præsentation' præd' fact' & diversis annis tunc ult' elapsis fuit ebrietati datus, a common drunkard, & communis de jurat', anglice a common swearer, ac ea occasione per legem sanctæ ecclesiæ fore inhabilem & personam minime idoneam fore admitt' ad aliquod beneficium cum curâ animar', per quod idem episcopus ut ecclesiæ ill' ordinari' recusavit admittere præd' Geo. Herbert ad vicariam ecclesiæ præd' prout ei bene licuit; & hoc parat', &c.

though in a case where the crown presented.

[359]

To this plea the Attorney General demurred, and the Bishop joined in demurrer, and exceptions were taken to the plea.

First, that the Bishop says *quod ipse nihil clamat in eadem ecclesia*, whereas it ought to be *in eadem vicar'*. *Sed non al-* locatur; for he adds *nisi admissio*, *institution'* & *induction'* vicar' ad ecclesiam præd'; for though the word *ecclesiæ* imports the rectory, and *quare impedit præsentare ad ecclesiam* is not good for a presentation to a vicarage, yet the reference here is to the ordinary, who if he is ordinary of the rectory, is also ordinary of the vicarage presentative derived therefrom. And so are the precedents.

2 Bro. 225.
226. Rall.
524.

Secondly, There is no certain averment that he was a common drunkard. *sed non allocatur*; for *ebrietas* dat' with an *anglice* is sufficient.

Thirdly, The averment that he was, is not certain, but only *quod super examin' episcopus invenit & per sacrum personar' fide dign' manifeste sibi apparuit quod fuit*, &c. *Sed non allocatur*; for in Dyer 168. 2 Rol. 591. it was allowed to be good, where the certificate of the ordinary said *diligentem & celerem fieri fecimus inq' par quam luculent' comperuimus & invenimus quod*, &c.

So a certificate of Bastardy was allowed, which said *quod fuit mulier prout per inq' invenit*, Fitz. Bast. 2. and there Rolfe said that it had oftentimes been allowed.

So *per quam inq' invenimus esse Bastard* was allowed. *Rast.* Cro. El. 518. Co. Ent. 520. Bast. 4. Specot's case 5 Co. 57. The plea was *super examination' episcopus invenit præfat' H. fore schismaticum*, &c. 2 Roll. Abr. 377. Moor. 456 2 Bullst 89. So in the case of *Hele* ver. the Bishop of Exeter. *Lutw.* 1095.

Fourthly, For that the Bishop does not shew that he gave notice of the refusal; and it was argued by me, that there is

is

[360] is a distinction between the refusal of a clerk of a common person and a clerk of the king. In the case of a common person, lapse incurs if he does not present within six months, and therefore notice is necessary. Hern. Plead. 539. Townsh. Tables 232. Co. Ent. 520.

But *nullum tempus occurit regi*, and therefore it is sufficient that he now informs the king of his refusal. The sole ground for requiring notice is the danger of a lapse, as appears by P. 18 H. 7. Keil. 49. b.

And therefore a patron may present before notice. 4 Co. 75. b. The plea is only an excuse for the defendant that he be not judged a disturber, and though upon a plea that the Bishop claims nothing but as ordinary, generally the plaintiff may have a writ to the Bishop presently, and the Bishop shall not be amerced, but the plaintiff for false clamour. Hob. 198.

So where the Bishop pleads specially, that he claims nothing but as ordinary. 38 Ed. 3. 2.

But it was resolved, that the plea was bad for want of notice alledged.

Case 180

Depaba *ver.* Ludlow. In C. B.

When insurance is, interest or no interest, the plaintiff has no occasion to prove his interest, for defendant can't controvert that.

ASSUMPSIT upon a policy of insurance, where the defendant insured the plaintiff, interest or no interest, against all enemies, pirates, takings at sea, and all other damages whatsoever. And upon trial it appeared that the ship was taken by a pirate of *Sweden*, and was in his possession for nine days, and then was retaken by an *English* man of war, and after the suit commenced, brought into *Herwich*. And the question was, Whether in such case the defendant was responsible?

And it was reserved by the chief Justice for the opinion of the court; and after argument by serjeant WHITAKER for the plaintiff, and by Dr. HENCHMAN for the defendant, it was determined for the plaintiff.

[361] For though it was objected, that the insurer was only responsible where the plaintiff had a property, and that the term of insuring interest or no interest was introduced since the revolution; yet it was said that such insurance was good, and the import of it is, that the plaintiff has no occasion to prove his interest, and that the defendant cannot controvert that.

And

De Term. S. Mich. 7 Geo. 1.

And though the ship was here retaken, yet the plaintiff received a damage, for his voyage was interrupted; and the question is not whether the plaintiff had his ship and did not lose his property, but what damage he sustained.

The King *ver.* The Bishop of Durham, the Chancellor, Master and Scholars of Cambridge, Edward Fenwicke, John Ward and Edward Fenwicke, Jun. clerk. Intr. Trin. 7 Geo. Rot.

QUARE impedit, in which the Attorney General declared, *Quod Eliz. regina seisit de ecclesia de Simondbourne in com' northum' ut de uno grosso in jure coronæ presentavit J. Hodges presentavit Cuthbert Ridley*, and that from him it descended to king Charles the second, and upon the death of Kember, John Rippon and Thomas Algood, by usurpation, presented Majors Algood; that the advowson descended to king James the second, and upon his abdication to king William and queen Mary; and that upon the death of Algood, the chancellor, masters and scholars of Cambridge, by usurpation, presented William Stainforth; that afterwards the advowson descended to queen Anne, and from her to his present majesty king George, to whom upon the death of Stainforth the right of presentation appertained.

A grant of a manor with all advowsons, &c. thereunto belonging will not extend to an advowson served in ancient times, tho' it was appendant to the manor 300 years ago.

[362]

The Bishop pleaded, that he claimed nothing but as ordinary.

Edward Fenwicke, sen. pleaded, That queen Elizabeth was seised of the manor of Wark to which the church of Symondbourne was appendant, and presented Hodges, and that the manor *ad quod*, &c. descended to king James the first, who presented Ridley, and by letters patent 11 Jan. in the 11th year of his reign granted the said manor *cum pertin'* to Elizabeth Howard wife of Theophilus lord Howard, afterwards earl of Suffolk and her heirs, and that upon the death of Ridley the earl of Suffolk, in right of his wife, presented Kember, and the manor descended to James earl of Suffolk, who by indenture 2 July 1664 inrolled, &c. bargained and sold to Sir Francis Ratcliff, afterwards earl of Derwentwater, in fee, who by deed 4 Sept. 1665 granted the next avoidance to J. Rippon and Thomas Algood, who upon the death of Kember presented M. Algood, and that by the statute 3 Jac. 1. cap. 5. the university shall present to the benefice of

of a recusant convict, and the earl of *Derwentwater* being a convict, upon the death of *Algood* the university presented *William Stainforth*. That the advowson descended to *James* earl of *Derwentwater*, who by indentures 15 Aug. 12 *Anne*, granted the next avoidance to the defendant *Edward Fenwicke* sen. to whom the presentation upon the death of *Stainforth* belonged, &c. *absque hoc*, That queen *Elizabeth* was seised in gross. *Edward Fenwicke* jun. pleaded that he claimed nothing but upon the presentation of *Edward Fenwicke* sen.

[363]

The chancellor, masters and scholars of the university of *Cambridge* pleaded, that *Edw. 2.* was seised of the manor of *Wark*, *ad quod*, &c. that it descended to *Edw. 3.* who by letters patent 9 May 25 *Edw. 3.* granted the advowson to the warden and college of the chapel of *Windsor* and their successors, and so derived the advowson to queen *Elizabeth* who presented *Hodges*, and upon his death king *James 1.* presented *Ridley*, and having the manor of *Wark* also, he by letters patent 12 Jan. in the 11th year of his reign granted *tot' ill' castr', honor' & maner' de Wark*, &c. *ac omnes advocacion', &c. omnium & singular' ecclesiar'*, &c. *infra com'*, &c. *in eodem litt' pat' specificat' vel alibi præd' maner'*, &c. *specian', pertin', &c. aut ut memb'*, &c. *unquam ante tunc habit', cognit', reputat'*, &c. to *Elizabeth* the wife of *Theophilus* Lord *Walden* heir apparent to the earl of *Suffolk* and her heirs, by which she was seised of the manor and of the advowson, and upon the death of *Ridley* presented *Kember*, and so derived the advowson to *Edward* earl of *Derwentwater*, who being a recusant convict, the university upon the death of *Algood* presented *Stainforth*, and then derived the advowson to *James* earl of *Derwentwater* an infant, and that by the statute 12 *Anne*, sess. 2. cap. 14. every papist or person professing the popish religion, and every infant of such papist not being a protestant, and every mortgagee, trustee, &c. of such, is disabled, &c. and the university shall present, &c. upon which the earl of *Derwentwater* not being a protestant, but son of a papist, &c. the presentation belonged to the university, who presented the defendant *Ward absque hoc*, that king *James 1.* died seised of the advowson.

Defendant *Ward* pleaded that he did not disturb, &c.

To the pleas of the bishop, *Edward Fenwicke* jun. and *Ward*, the Attorney General replied, and prayed judgment with a *cessat executio*, &c.

De Term. S. Mich. 7 Geo. 1.

To the plea of *Edward Fenwicke sen.* the Attorney General demurred, and for not joining in demurrer took judgment.

To the university's plea the Attorney General demurred, and shewed for cause, that the traverse is not material, and that the defendant did not shew any title to the advowson; and the university joined in demurrer.

And it was argued, that by the letters patent 11 Jac. 1. the advowson of *Symondbourne* did not pass, for it is not expressly named in the patent, and by 17 Edw. 2 *Prærog. Regis* 15. advowson appendant does not pass by the grant of a manor *cum pertin'*, if it be not expressly mentioned. And though it is admitted by the pleadings, that this advowson was appendant to the manor of *Wark* in the time of Edw. 2. and the grant by the letters patent is *inter al'* of the manor of *Wark*, with all advowsons, &c. *penden' aut ut membr'*, *parcel' eorundem maner'*, *&c. unquam ante hac habit'*, *cognit'*, *accept'*, *occupat'*, *usitat'*, *reputat' existen'*, &c.

[364]

These words cannot pass an advowson severed from the manor 300 years, though it was *ante tunc* appendant to the manor.

In the case of *Imber ver. Wilking*, Dyer 362. Co. Ent. 380. A grant of a manor with all woods, &c. *specian' aut ut membrum*, *parcel' eorundem maner'*, *&c. antehac cognit'*, *accept'*, *habit'*, *usitat' seu reputat' existen'* does not extend to woods which were not parcel thereof at the time of the grant, they ought to be parcel thereof in reputation time out of mind, &c. So 2 Roll. 186. Co. Ent. 38. A grant of a manor with all the lands, woods, &c. *specian' aut ut membr'*, *parcel'*, *&c. ante tunc habit'*, *cognit'*, *accept'*, *seu reputat'*, may extend to woods in the hands of the king, and parcel of the manor within 17 years, but not to woods severed in antient times.

And so it was resolved by the court.

Judgment for the king.

Case 182

Rogers *ver.* Wilfon.

In a contract for stock, it must appear by the register itself to whose use the contract was made.

DE B T upon a bond dated 24 July 7 Geo. for 200l. the defendant prayed Oyer; upon which the condition appeared to be this:

Whereas *Ph. Brooke*, as executor of *F. Brooke*, being possessed of 4000l. lottery annuities, 6 July agreed to sell them for 4600l. to be assigned and payed for before 6 Aug. next; and whereas soon after the said *Ph. Brooke*, at the request of the plaintiff and defendant, transcribed them in his own name into the *South-sea*.

Now if the defendant, in consideration of a valuable consideration, shall transfer to the plaintiff a moiety of the said stock allowed by the *South-sea Company* for the same, then, &c. And then pleaded, that the contract between the plaintiff and defendant was for sale of *South-sea* stock, which was neither performed nor compounded before the 29th of Sept. 1721. and that neither the bond, with the condition and contracted therein contained, or any abstract or memorial thereof, was registered before 1 Nov. 1721, &c.

The plaintiff replied, that he by deed dated 27 Oct. 1720, assigned the bond and all the benefits of the stock, &c. in the condition mentioned, to *William King*, for his own proper use, who registered it, &c. and issue was joined upon the registering.

[366]

And on the trial at *Guildhall* 27 Nov. 1722. before Lord Chief Justice PRATT, it appeared upon the register of the assignment produced, that the assignment was registered, and not the bond; and the Chief Justice said, that the bond and condition which contained the contract ought to have been registered. Then a register of the bond and condition

which contained the contract ought to have been registered. Then a register of the bond and condition was produced, but it did not appear to whose use the contract was made; and it is not enough that it is said in the assignment, that it was to the use of the plaintiff, though the assignment was also registered, for that is only a recital in the deed of assignment; but by the statute, it must appear by the register itself to whose use the contract was made. And to this opinion the Chief Justice adhered; but on the plaintiff's importunity permitted a case to be made, which was never argued; but the plaintiff commenced a new action in the Common Pleas, upon which a special verdict was found.

Stedman, qui tam, &c *versus* Hay. In C. B. Case 183

PROHIBITION upon a libel in the spiritual Court by the defendant, for that the plaintiff sat *in primo et tertio locis in sedili*, in the church of *Abberley in Worcestershire*, which places the defendant claimed, one as belonging to a messuage or tenement named *Crowlands*, the other to a messuage or tenement named *Nurtons*.

The plaintiff in his declaration in prohibition declares, that all prescriptions ought to be determined by common law, that *J. Farmer* and *Susan* his wife, in right of the wife, were seised of a messuage and lands called *Southalls* in *Netherton* in the said parish of *Abberley* in fee, and that time out of mind there had been an ancient seat in *borealis parte ecclesie de Abberley*, and that the said *Farmer* and his wife, and all, &c. prescribed *habere usum primi & tertii loci in sedili præd'* (the second place belonging to the defendant as tenant of *Nurtons*) and because the plaintiff, as tenant of *Southalls*, used those seats, the defendant libelled against him in the spiritual court.

The defendant pleaded, that he had a faculty granted for those places, and traversed *absque hac quod Farmer & uxor et omnes, &c. a tempore, &c. habuer' usum præd' primi et tertii loci in sedili illo*. Issue was joined upon the traverse, and a verdict for the plaintiff.

And now Serjeant **PENGELLY** moved in arrest of judgment, that the plaintiff did not alledge in his declaration any usage to repair the seats; for of common right all the seats in the church belong to the parishioners in general, who are bound to repair the church; but for the better order,

When a prescription for a seat in a church is found by the verdict, the repairing, which is only a circumstance requisite to support the prescription is of necessity included.

[367]

der, and to prevent the confusion which would follow, if every parishioner sat where he pleased, the ordinary has been allowed to dispose of the seats, and no prohibition ought to be granted in such case: But where a man has always repaired a particular seat, he may prescribe for that, and the usage of repairing is the foundation of such prescription, without which it would be void; and so it was resolved 2 Cro. 366. Noy. 104. (which seems to be the same case) that if a man time out of mind had used to repair a seat in the isle of the church, and to sit and bury there, the isle shall be peculiar to his messuage, and he shall not be displaced by the ordinary, parson or churchwardens. But usage of sitting and burying, without usage of repairing, does not give any property.

And therefore no body can prescribe for a seat in the
 Moor 878. body of the church, for it is always repaired by the parishioners. But where Sir Bernard Whetstone had time out of mind used to repair a pew in the body of the church, he
 Hob. 67. was allowed to prescribe for it. So a custom for the churchwarden to dispose of the seats in the body of the church was disallowed, where the parishioners repaired the
 2 Lev. 241. church. So where the isle, &c. had always been repaired at the common charge of the parishioners, the seats there shall be disposed of by the ordinary, as well as in the body
 2 Cro. 366. of the church. And in ancient times, custom to repair
 [368] was alledged in an action upon the case for disturbing a man in his seat in the church. 2 Cro. 605. But of later times it has been held, that there is no occasion to alledge it in the declaration, but that it is sufficient to give it in evidence at the trial; and after verdict it shall be presumed to be well proved, otherwise the verdict could not have been for the plaintiff. 1 Sid. 88, 203. And the distinction there was taken, between an action upon the case and a prohibition; for in a prohibition it was said, that custom to repair must be alledged in the declaration. And HAILE thought there was good ground for that distinction, for an action upon the case is against a wrong doer and stranger; a prohibition, against one who *prima facie* has a right. And this distinction was cited and agreed to 2 Jon. 4. 3. Lev. 73.

And it was agreed on the other side, that usage of repairing was necessary, without which there could be no prescribing for a seat in a church; and perhaps if the defendant had demurred to the declaration, it would not have been good; but when the defendant has pleaded and traversed

De Term. S. Mich. 9 Geo. 1.

versed the prescription which is found for the plaintiff, which could not have been found unless a custom of repairing had been proved, the declaration shall be aided; 1 Mod 292 as in trespass and other actions, where the declaration is uncertain or insufficient, it shall be aided by the plea of a collateral matter, and verdict for the plaintiff. Lut. 1382, 1392, 1492. 2 Salk. 662, 663.

And the custom to repair is only a circumstance requisite to support the prescription, and when the prescription was found, the repairing is of necessity included.

After P. 9 Geo. Judgment was given for the plaintiff; for after verdict it shall be presumed that a good prescription was proved.

[369]

Case 184

Hughs *ver.* Clubb & al' In B. R.

EJECTMENT upon the demise of *Herbert Watts*; to which the defendant pleaded not guilty; and upon the trial in *Kent*, before PRATT, Chief Justice, the case appeared to be this:—

John Watts, the ancestor of the lessor of the plaintiff, and to whom the lessor was heir, by his will 30 Sept. 1684, devised the lands in question, of which he was seised in fee, to *Elizabeth* his wife, *habend'* to her and the heirs of her body.

Elizabeth married a second husband — *Cox*, and suffers a common recovery, and by indenture 2 Oct. 1689. declared the uses to — *Cox*, her second husband for life, remainder to the heir of the survivor.

Elizabeth survived, and afterwards married *Edward Clubb*, and settled this estate to him in fee, and died without issue, and the defendant claimed under this settlement.

The question was, whether the recovery suffered by the wife was not void in this case by 11 H. 7. c. 20. which enacts, That if any woman hath or shall have any estate in dower for life, or in tail to herself or for her life, in any land, &c. of the sole inheritance or purchase of her husband, and shall sole, or with an after-taken husband discontinue or suffer recovery, &c. such recovery, &c. shall be void.

And this case was reserved for the opinion of the Chief Justice, and by him determined, that it was not within the statute; for though it is within the letter, it is not within

A man devises to his wife in tail general, remainder to J. S. in fee, and the wife with a subsequent husband suffers a recovery; held good against the heir of the devisor, notwithstanding the stat. 11 H. 7. c. 20. Confirmed by 32 Hen. 8, c. 34.

[370] the intent of the statute, which extends only to cases where the husband settles lands upon his wife by way of jointure, to which the issue between them shall be inheritable.

Cro. El. And therefore if a husband settles lands upon himself and his wife in fee, though it be a good jointure, 4 Co. 3. Moor 93, yet her alienation is not restrained by 11 H. 7. c. 20. Dyer 250, 715. 3 Rep 50, 248. So it was resolved Cro. Eliz. 524.

60. Cruise on Recov. 154. 3 Comy. Dig. 71. 2 Bac. Abr. 93. Gilb. in notis. 1 Salk. 185. Jen. 181, 303. Hob. 176. 2 Sid. 41, 73. 4 Mod. 45. 2 Bac. Abr. 93.

Co. Lit. 366. And in 1 Leo. 261. Cro. Eliz. 2. it was resolved, that if a man seised in fee devise to his wife in tail general, remainder to J. S. in fee, and the wife with a subsequent husband levy a fine, this bars the issue; for though it is within the words of the statute, it is not within the intent of it; which was designed to prevent a wife advanced by her husband from prejudicing the issue of her husband; and that is of the same import with the present case.

2 Bac. abr. 92, in notis. Cruise on recov. 58.

Term. Sanct. Trin.

9 Geo. 1. In C. B.

Robinson *versus* Mead.

Case 185

TRESPASS for an assault and battery of the plaintiff's wife, *per quod consortium amisit*.

The defendant pleads in abatement, that he was a mercer, and no gentleman, as he was named in the writ; to which the plaintiff demurred, supposing that the exception was taken to the addition, in regard that the plaintiff had mistaken his degree, for that he ought to have shewn of what other degree he was, and that it was not enough to say that he was of such a mystery. *Sed non allocatur*; for here the defendant denies absolutely the addition given him by the writ, and then *non constat de persona*, for Thomas Mead mercer, and no gentleman, cannot be Thomas Mead gentleman. It is true the statute 1 H. 5. c. 5. requires only that in original writs an addition shall be made of the defendant's estate, degree or mystery, and therefore it is sufficient where a defendant has several additions to give him one or other, or to give him the addition of his degree or mystery or both; but when the defendant has no such addition as is given him by the writ, he may plead as here, *quod non est generosus, nec suscepit, nec fuit de gradu generosi*; which the plaintiff confessed by his demurrer; and when by his plea in abatement the defendant denies the addition given him by the plaintiff, he is obliged by the rules of pleading to shew his addition, by which he might be sued; and therefore 28 H. 6. 26. the defendant pleaded that he was a merchant, *et non generosus*, and held good.

Judgment for the defendant.

I was of counsel for the defendant.

Plea in abatement, that defendant was a mercer, and no gentleman, as named in the writ, held good.

2 Inst. 596, 666, 669. Titles are not additions. Terms de Ley. 20.

[372]

1 Lill 34.
Cro. Jac.
610. 1 Rol.
780. 1 Salk.
5. 3 Salk.
10:2 Hawk.
87, 187.

Walter

A devise,
that if Wil-
liam the el-
dest son of
the testator

should happen to die without issue, that then, and not otherwise, after William's death, he devised it over to his son Richard and his heirs; held that William took an estate-tail by implication.

EJECTMENT upon the demise of *Richard Weeks*; and upon the trial of the assizes in *Cornwall*, before Mr. Baron Price, the case appeared to be this:

Richard Weeks, grandfather of the lessor of the plaintiff, being seised in fee, and having two sons, *William* his elder and *Richard* his younger son, by his will 10 March 1664. devised in these words:

It is my will, that if William Weeks my son shall happen to die, and leave no issue of his body lawfully begotten, that then in that case, and not otherwise, after the death of the said William my son, I give and bequeath all my lands of inheritance in Lawlissick unto the said Richard my son, to have and to hold the same, after the death of the said William, to him and his heirs.

The testator died the 10 March 1664. *William* his son and heir entered, and in Michaelmas 1692 suffered a recovery; and by indenture 30 June 1692, declares the uses of the recovery, to the use of *J. Foot* and his heirs, till payment of a sum of money, and then to himself and his heirs.

Afterwards by lease and release 8 & 9 June 1697, he conveyed the equity of redemption to *J. Foot* and his heirs, under whom the defendant claimed.

[373]

9 Jan. 1721, *William Weeks* died without issue, and 12 November 1715. *Richard Weeks* died, leaving *Richard Weeks* the lessor of the plaintiff his son and heir, who upon the death of *William* brought his ejectment; and the question was,

Whether he was barred by the common recovery suffered by *William*? Which was argued before Mr. Baron Price at his chambers in *Serjeants Inn*.

And I insisted, that the devise to *Richard* the younger son was an executory devise; for he could not take by way of remainder, for a remainder cannot be without a particular estate; but here no estate is devised to *William*, but the testator suffers his estate to descend to him, and only makes a devise to *Richard*, if *William* died and left no issue of his body,

body, and therefore *Richard* cannot take at all, if he does not take by way of an executory devise.

A man cannot take by devise, if there are not words which give the estate to him: A man deviseth to his son after the death of his wife, 2 Leo. 226. 2 Jon. 98. 2 Lev. 207. resolved that the wife took nothing.

And the case in Vaugh. 259, 262. *Gardiner* ver. *Sheldon* was: A man devised, that after the death of his son and daughters without issue; and if it shall happen my son *Geo.* and *Margaret* and *Katherine* my daughters die without issue, then all my freehold lands shall go to my nephew *Rose* and his heirs; and it was agreed, that his daughters took nothing at all by his will,

It is true, that in this case in Vaugh. it is said, that *Rose* did not take by way of executory devise, because the estate given to him was to take effect after the death of the son and daughters without issue, which was a contingency too remote for the law to allow.

But here the contingency was to take effect upon the death of *William*, for the words are not, *if William die without issue*, but *if he die and leave no issue*, which are tantamount to saying, *if he die not having issue at the time of his death*; and this is enforced by the subsequent words, *if William die and leave no issue, then in that case, and not otherwise, after the death of the said William, I give the same to Richard, to hold after the death of the said William, to him and his heirs*; by which it appears, that his intention was, that *Richard* should have the lands immediately upon the death of *William*.

[374]

Serjeant *Chesbrey* *e contra*: No one shall take by executory devise, but he who cannot take any other way, and here he may take by remainder; for by the words it appears to be the testator's intention, that *William* his eldest son should take in the first place; and I know no rule for the construction of a will, but the intention of the devisor, and here his intention is manifest that *William* should take. 9 Co. 127. Where a man devised to his wife, and then says, *after her death my son William is to have it, and if he die, his son is to have it*; it was held that *William* took an estate-tail.

So Mo. 127. there were no words of gift, yet it was held a good devise. So 1 Rol. 836. 2 Cro. 415. And in this present case the recovery was suffered upon the opinion of Serjeant *Pemberton* and *Levinz*, that *William* by this

De Term. S. Trin. 9 Geo. 1.

this will took an estate-tail, remainder to *Richard*
To which the baron inclined;

And afterwards upon further consideration gave his opinion, that *William* took an estate-tail by this will; for the words shall not be construed to give an estate by way of executory devise, but where the devisee cannot take any other way.

[375] But here *William* took by the will, for it is a necessary implication, that he shall have it to him and his heirs of his body, for the heir shall take by the will though he is not expressly named, or there be no devise to him by express words.

Swinb. 112.

Bridg. 137.

Litt. Rep.

8, 259, 347.

Cro. Jac.

695. Cro.

Car. 367.

369. Hard.

149.

As 9 Co. 128. A devise to the wife for life, and after her decease *William* is to have it, and if he die his son is to have it.

It was adjudged *William* took an estate-tail.

So no devise expressly to the son, yet he took. Mo. 127.
1 Rot. 836. 2 Cro. 415.

Term. Sanct. Mich.

10 Geo. 1. In C. B.

Walker *versus* Lester.

Case 187

DEBT for money lent at a play called *all-fours*. -
The defendant pleaded *nil debet*.

The plaintiff in the record of *nisi prius* omitted the words *et præd' quer' scilicet*.

And after trial before King Chief Justice in *Suffex*, and verdict for the plaintiff, judgment was arrested. And now the plaintiff moved, that the record of *nisi prius* should be amended by the original record. And *per cur'*, it shall be amended, for the omission was only the misprision of the clerk; 2 Cro. 502. *Harris's* case, and Salk. 47. are cases, as strong as the present case.

The plaintiff in the record of *Nisi Prius* omitted the words; *et præd' quer' scilicet*; but it was held amendable by the original record. See rules relative to amendment, cases, Term.

Ld. Hard. 43, 44. Cro. Jac. 677. 3 Mod. 112.

Walker *versus* Priestly. In C. B.

Case 188

DEBT upon a bond, which upon oyer appeared to be conditioned for performance of covenants.

In covenant the plaintiff by his replication as-

signs several breaches, to which the defendant does not rejoin; though the plaintiff cannot waive the breaches, (being entered on the roll) yet he may take judgment for want of the rejoinder.

Defendant pleads covenants performed.

Plaintiff replies, and assigns several breaches.

The defendant did not rejoin; upon which the plaintiff signed judgment.

[377]

And now Serjeant *Chesbyre* moved to discharge the judgment, for that the plaintiff had not executed a writ of inquiry; for the plaintiff here pursues his remedy by aid of the statute 8 & 9 W. 3. c. 11. which enacts, That a plaintiff

plaintiff may assign as many breaches as he pleases, and the jury on trial of such action, shall and may assess not only such damages and costs as have hitherto been usually done in such cases, but also damages for such of the breaches so to be assigned as he shall prove to be broken; and if judgment shall be given on confession, demurrer or *nihil dicit*, the plaintiff may suggest on the roll as many breaches as he thinks fit; upon which shall issue a writ to the sheriff to summon a jury to appear before the justices of assize or *Nisi prius*, to inquire of the truth of every one of these breaches, &c. and therefore, when he takes the benefit of the statute to assign several breaches, he ought to pursue the direction of the statute throughout; and as the defendant did not rejoin, he ought to have taken out a writ of inquiry, &c.

Sed non allocatur; for the plaintiff has his election to proceed upon the statute or at common law; and therefore when the defendant *nihil dicit in barram*, or confesses the action, or demurs, the plaintiff may suggest upon the roll several breaches, but there is no necessity for it; and when defendant pleads, and the plaintiff by his replication assigns several breaches, to which the defendant does not rejoin, though the plaintiff cannot waive the breaches assigned, (for by the practice of the court they must be entered upon the record) yet he may take judgment for want of a rejoinder, and need not inquire of the several breaches assigned; for this writ is not a writ of inquiry before the sheriff, but before the justices of *nisi prius*, which would be a very great delay to the plaintiff.*

[378] Keld & al', Assignees of Cholmley, Bailiff of the liberty of Whitby in the county of York, *versus*
Case 189 Harding. In C. B.

Where a bailiff is charged directly with a tort, it ought to be shewn that

DEBT upon a bail-bond in the penalty of 200l. and the declaration alledged, *quod cum Jana Hudson post Trin. 1706. (viz.) 30 Maii 8 Geo.—apud Whitby infra libertat' præd' per H. Cholmley tunc capital' sen' libertat' de Whitby præd' arrestat' fuit virtute cujusdam warranti per*

* The plaintiff has not since the making of the statute an election to proceed thereupon or at common law; but must proceed upon the statute. Law of damages 67. D. age v. Bland. Trin. 8 Geo. 3. C. B.

tunc vic' com', &c. direct' pro captione ejusdem Janæ, ita quod idem vic' com' præd' haberet corpus ejus coram just' apud west' a die sancti Mich' in tres sept' prox' adresp' Ric', Johanni & Will' o Keld in placito transgr' ac etiam in placito debiti super demand 100l. eademque Janâ in custod' præd' H. Cholmley virtute brevis & warrant' præd' existen' ipsa & W. Hill & Th. Harding def' 30 May 8 Geo.—per præd' script' obligat' concesser' se teneri, &c. præd' H. Cholmley tunc ballivo libertat' præd' per nomen officii sui in præd' 200l. for her appearance, &c.

he is bailiff of a liberty who has return of writs; but otherwise it is sufficient to shew generally, that he is such a person as has authority to take bail.

Sed præd' Jana non comperuit, per quod, &c.

Defendants demurred to the declaration, and the plaintiff joined in demurrer.

And it was objected by Serjeant *Wynne*, first, That it does not appear when the writ issued, and the writ ought to be fully shewn, for the party may say *nul tiel record*. Sed non allocatur; for it is sufficient to shew it generally; the statute 4 & 5 Annæ says, If any person shall be arrested, &c. by any writ, bill or process issuing out of any of her Majesty's courts of *Westminster*, at the suit of any common person, and the sheriff or other officer takeeth bail, &c. and here it appears, that the writ issued out of the Common Pleas against *Jane Hudson* at the suit of the plaintiff in placito transgr' ac etiam in placito deb' 100l. and though it did not appear when it was tested, though it was objected that that was necessary, the court did not seem to think it of any weight, for it shall not be presumed to have an irregular teste.

[379]

Secondly, That it is not said, that the warrant was under the seal of the office of the sheriff. Sed non allocatur; for it was not the warrant of the sheriff if it was not under the seal of his office.

Thirdly, That it does not say, that a warrant was made by the sheriff. Sed non allocatur; for she could not be arrested unless a warrant was made out.

Fourthly, That the bail bond was given to the bailiff of the liberty, and not to the sheriff, and it does not appear that he had any return and execution of writs, &c.

And *primâ facie* it shall be presumed that every place in a county is under the sheriff.

By 2 Edw. 3. cap. 12. Hundreds and wapentakes shall not be severed from the county.

And by the 14 Edw. 3. cap. 9. they are reannexed to the county.

And

And 4 Inst. 267. says, That all grants of the bailiwick of a hundred since those statutes are void. So Cro. Car. 330. *Myn ver. The Bailiff of the liberty of the Dean and Chapter of Westminster*, in an action for an escape, it was resolved, that the declaration did not shew of what liberty the defendant was bailiff, or that he had execution and return of writs, and was therefore bad, for that ought to be shewn expressly. So in an action on the case by the bailiff of a liberty against the sheriff for entering into his franchise. 1 Vent. 399.

[380] So if a warrant to a bailiff of a liberty is pleaded, it is shewn that he had return, &c. of writs. Lutw. 594. *Sed non allocatur*; for though where a bailiff is charged directly with a tort, it ought to be shewn that he is bailiff of a liberty, who has *returna brevium*, yet here it is sufficient to shew generally that he is such a person as had authority to take bail.

And by the statute 23 H. 6. c. 10. the sheriff, under-sheriff, sheriff's clerk, steward or bailiff of a franchise, servant, or bailiff or coroner, are restrained from taking under colour of their office more than 4d. for a return or copy of a panel, &c. then in the clause which relates to taking bail, it is enacted, That the sheriff and all other officers, as aforesaid, shall let out of prison all persons by them arrested, &c.

And that no sheriff, nor any the officers or ministers aforesaid, shall take any obligation for any cause aforesaid, but only to themselves, of any person, nor by any person in their ward, &c. but by the name of their office, &c. And therefore the bailiff of a franchise has power to take a bail-bond, and must take it to himself, and by the name of his office.

And by 4 & 5 Annæ, cap. 16. sheriff or other officer who takes bail may assign, &c. So the question here remains, Whether it does not sufficiently appear by the declaration, that *H. Cholmley*, to whom the bond was given, was bailiff of a franchise.

And the court were of opinion that this appeared to a common intent.

For it is said that the plaintiffs are assignees of *H. Cholmley*, cap' *ballivi libertat' de Whitby*.

That *Jane Hudson* was arrested at *Whitby*, *infra libertat' præd', per præd' H. Cholmley adtunc cap' ballivum libertat' de Whitby*.

That

De Term. S. Mich. 10 Geo. 1.

That *Jane Hudson* being in his custody gave the bond to him, *eidem H. Cholmley adtunc cap' ballivo libertat' præd' existen' per nomen officii sui præd'*, &c. And therefore judgment was given for the plaintiff.

Acherley and his Wife, Sister and Heir of Thomas [381]
Vernon, *ver.* Bowater Vernon & al'. In Canc'. Case 190

THOMAS VERNON by his will 17 Jan. 1711, devised to *Mary* his wife 1000l. *per ann.* for life, to issue out of his real estate, his capital messuage in *Hanbury*, &c. To *Elizabeth* his sister 200l. *per ann.* for her life; and 1000l. to *Letitia* her daughter for her portion; and after other legacies he devised the residue of his real and personal estate to *Roger Acherly, George Vernon, George Wheeler, J. Bencroft* and *Richard Vernon*, and their heirs, executors and administrators, on trust to vest the residue of his personal estate in lands of inheritance, and that his trustees shall stand seised and possessed of his real and personal estate to the uses of his will during his wife's life, and after her decease, if he should die without issue, to the intent that his freehold and leasehold estate, and the lands to be purchased, should be settled to the use of the defendant *Bowater Vernon* for 99 years.

A codicil signed and published in the presence of three witnesses, held a republication of the will, and that both made but one will.
9 Mod. 68.
10 Mod.
518. 1 P.
Will. 783.
Fort. 183.
2 Eq. cal.
Abr. 209.
pl. 2. 565.
pl. 5.

Then to his first and other sons in tail male, &c.

Thomas Vernon purchased several fee-farm rents, assart rents, and other lands and tenements; and then by a codicil 2 February 1720, being two days before his death, he recites,

That he made a will dated 17 January 1711, and then says,

I hereby ratify and confirm the said will, except in the alterations hereafter mentioned.

The portion to my niece *Letitia*, daughter of my sister *Acherly*, shall be made up 6000l. and what I have given to my sister and niece shall be accepted by them in satisfaction of all they may claim out of my real and personal estate, and on condition they release all right, &c. to my executors and trustees in my will named; and thus having provided for my sister and niece, I devise all the lands by me purchased since my will to my trustees and executors in my will named, to the same uses and subject to the same trusts to which I have mentioned to devise the manor of *H.* and the bulk of my estate.

[382]

And

De Term. S. Mich. 10 Geo. 1.

And I revoke that part of my will whereby I appoint *Roger Acherly, Geo. Vernon and Edward Vernon*, three of my trustees in my will; and I desire my brother *Fran. Keck* and *John Nichols* to be two of my trustees, and devise my said real estate to them accordingly.

Lord Chancellor MACCLESFIELD 20. Nov. 1723. decreed, that the will was confirmed by the codicil in the presence of three witnesses was a republication of his will, and both together made but one will; and by the said will and codicil his fee-farm rents, assart rents, and lands contracted to be purchased, and all his real and personal estate (except the copyhold purchased before his will) did well pass.

The plaintiff appealed to the house of Lords.

First, For that the fee-farm rents and assart rents being purchased since the will made, the words of the codicil (*all my lands, &c.*) are not sufficient to pass them.

Secondly, The words of the codicil do not extend to the lands which the testator had agreed to purchase, but were not conveyed to him.

Thirdly, The devise to the new trustees, without saying *and their heirs*, gives them only an estate for life.

[383]

Fourthly, That no trust of the new purchase being expressly declared after the death of the trustees, they shall result to the heir.

Fifthly, That the codicil being by a separate and distinct instrument, does not amount to a republication of the will.

But the decree was affirmed.

And in the argument, as to the republication, four cases were cited for the plaintiffs.

First, *Lytton ver. Viscountess Falkland*, which case was this:

Sir *William Lytton* by his will 25 March 1700. devised all his lands to his nephew *Lytton Strode* and his heirs, and directed, that he should take the surname of *Lytton*; and his personal estate he devised to dame — *Ruffel* his sister, and *Lytton Strode*, and made them executors.

After his will made, Sir *William Lytton* purchased the equity of redemption of some mortgages in fee, which were mortgaged to him before he made his will.

And 13 Jan. 1704, by a codicil attested by three witnesses, he says,

“ I make

See 2 Vent.
346. Bourn
v. Tynte;
which case
Len. Hard.
disapproves
of in Heath
v. Perry 3
Atk. 102.

De Term. S. Mich. 10 Geo. 1.

"I make this codicil, which I will shall be added to, and be part of my last will which I have formerly made."

And the Lord Chancellor COWPER, assisted by Sir JOHN ^{Burtons} TREVOR master of the rolls, Lord Chief Justice TREVOR, ^{Law v. G'll.} and Mr. Justice TRACY, 16 June 1708, decreed, that ^{Cowp. 50,} this was not a republication; for since the statute 29 Car. ^{52. 3 Burr.} 2. there can be no devise of lands by an implied republica- ^{1496 1 Vez.} tion; for the paper, in which a devise of lands is contained, ^{191. 1 Will.} ought to be re-executed in the presence of three witnesses. ^{310.}

Second, The *Attorney General* ver. *Brains*, 3 Ch. Rep. [84] 8, 152.

Third, The case of Serjeant *Maynard's* will. He by his will 6 Mar. 1689. wrote with his own hand, signed by him, but not before any witnesses, devised lands, &c. He afterwards wrote a codicil, with his own hand upon the same paper, and signed it, and it was attested by three witnesses.

And the question was, whether this was a republication of the will, so that the lands mentioned in the will should pass by it.

And upon a trial at bar a special verdict was found, but no judgment was ever given, because the will was established by act of parliament.

Fourth, *Penphraze* ver. *Lord Lansdown & al*, in ejectment, Hill. 11 Annæ, Rot. 620. a special verdict was found,

That *John* earl of *Bath* by his will 11 Oct. 1684, only executed, took notice, that his lands were settled upon his sons *Charles* and *John* in tail male, and then devised in these words,

"In case my sons shall have no issue male, then for the preservation of my name and family, I devise my said lands unto my brother *Bernard Granville* and the heirs males of his body issuing.

Bernard Granville died in the life of the testator, having issue the defendant *George*, then Lord *Lansdown*, by which the devise to *Bernard Granville* in tail male lapsed. 15 Aug. 1701. The testator sent for seven persons, and said, "I sent for you to be witnesses to the republication of my will;" and then took a codicil dated 15. Aug. 1701. in one hand, and the will in the other, he said, "This is my will, whereby I have settled my estate, and I publish this codicil as part thereof;" and then signed the codicil (which lay upon the table with the will) in the presence of the witnesses, who subscribed it in his presence. [35]

By

By this codicil he devised in these words, "Whereas I heretofore made my will dated 11 Oct. 1684. which I do not intend wholly to revoke, but in regard to the many accidents and alterations to my family and estate, I by this codicil, which I appoint to be taken as part of my will, devise as follows," and then devised divers manors, &c. to his son *Charles* and his heirs, and 100l. *per annum* to his nephew, then Lord *Lansdown*, for life.

He then put the will and the codicil together in a sheet of paper, and sealed them up in the presence of the same witnesses, but the will was not unfolded in their presence, nor did any of them write their names as witnesses on or under the will, or on the same paper, but on the codicil only.

And by PARKER C. J. and the whole court, this was held no republication; for since the statute 29 Car. 2. there shall be no republication by implication, but the will must be re-executed, otherwise a devise of lands shall not be good. See Post. 513.

But at the importunity of the defendant a special verdict was found.

I
o
s
o
is
et
e
e,
or
al
as
re
ft
be
a

E

Term. Sanct. Trin.

12 Geo. 1.

Dean ver. Coward In C. B.

Case 191

A MOTION was made to mend a common recovery.
The case was :

That *Richard Bigg* seised in fee, upon the marriage of *J. Bigg* his son, settled lands to the use of *John Bigg* for 99 years, if he so long lived; then to trustees and their heirs for the life of *John Bigg*; remainder to his first and second and other sons in tail male; remainder to the second and other sons of *Richard* in tail male; remainder to the right heirs of *John Bigg*.

The lands settled lay in *Sunning, Hurst, Hurley, Clever, Wokingham, Wargrave and Wallingford* in *Berkshire*.

By indentures 8 and 9 June 1696, *Richard Bagley* cousin and heir of *Thomas Bagley* the surviving trustee for the contingent uses in the settlement, and *Richard Bigg* and *John Bigg* the eldest son of the said *John Bigg*, in the life of the father, conveyed the lands in *Sunning, Hurst, Hurley, Clever, Wokingham, Wargrave and Wallingford*, to *James Coward* and his heirs, to make him tenant to the precipe for a common recovery, which was to be to the use of *John Bigg* the father for 99 years, if he so long lived, then to trustees for 1000 years, upon trust to make mortgages by the direction of *John Bigg* the son; remainder to *John Bigg* the son and his heirs.

Trin. 8 W. 3. a recovery was suffered, but the villis *Wargrave and Wallingford* were omitted in all the proceedings of the recovery.

John Bigg the son by his will 15 June 1723 devised all the lands to his uncle *Lovelace Bigg* in fee; and *William Bigg* younger son of *John Bigg*, upon whom the settlement was made by *Richard Bigg*, claimed the lands in *Wargrave and Wallingford*, by virtue of the intail in the said settlement;

A mistake in a recovery whereby two of the villis were omitted, allowed to be amended by the deed that lead to the uses.

[387]

De Term. S. Trin. 12 Geo. 1.

ment ; and upon this a motion was made that the recovery should be amended by the deed 9 June 1696, and a rule *nisi* granted, which in Michaelmas term following was made absolute ; and many precedents were cited and rules produced for this purpose ; particularly,

Trin. 13 Car. 1. Wrightwick and others *ver.* Masters, on the motion of Serjeant *Clarke*.

Mich. 13 Car. 1. Broke and others *ver.* Biddulph, on the motion of Serjeant *Heeth*.

Mich. 2 Car. 2. Parker and Jolly *ver.* Cotton & ux', on the motion of Serjeant *Clarke*.

Pasch. 24 Car. 2. Tregeare *ver.* Nich. Genns.

Mich. 4 W. & M. Grange *versus* Treby, on the motion of Serjeant *Pemberton*.

Term. Sanct. Mich.

[388]

13 Geo. 1. In Scacc'.

The King and Clark.

Case 192

EDWARD PAUNCEFORD, being appointed cashier to the Commissioners of Excise, employed *Nich. Clark* to be his billman or receiver, who by his obligation of the 14th of March, 1715, was bound to the King in 1000l. with a condition to satisfy, pay and deliver each day unto the said *Edward Paunceford*, his agent, executors, or assigns, all such sums, bills, bonds, notes and other papers, as the said *Nich. Clark* shall receive by virtue of any bills of exchange, notes, &c. relating to the excise, or on any accounts belonging to his Majesty, or to the said *Edw. Paunceford* on his own account, and shall due accounts make with the said *Edw. Paunceford* of or concerning any bills of exchange, &c. belonging to his Majesty, or relating to the said *Edw. Paunceford*, and shall follow all such orders, &c. as he shall receive from the said *Edw. Paunceford*, &c.

Extent shall go for the king's money against any one that imbezils it, but not where money due to the king is paid, and his security cancelled before bond given by deputy to principal for balance in his hands.

And by another obligation of the same date *Nich. Clark* and others were bound to the King in 500l. upon condition to the same intent and purpose.

Upon motion of the Attorney General, and affidavit that *Nich. Clark*, had received 1876l. arising from the revenue of the excise, and had paid only 398l. and the residue 1478l. was by him imbezzled and converted to his own proper use, and that a commission of bankruptcy was then awarded against him, it was ordered by the Court, that a writ of extent should immediately be awarded, to extend the estate and effects of the said *Nich. Clark*, bearing date the 26th of October, (which was the day of the motion) but that it should not be executed till four days after notice given to him and the commissioners of bankruptcy.

[389]

And then it was moved to discharge this order, because it did not appear, that the debt to the King remained due ;

De Term. S. Mich. 13 Geo. 1.

and it was shewn by affidavit, that the King was paid all his dues by *Edw. Paunceford*, who settled accounts with *Clark*, and took his obligation for the balance, and paid all the debt due to the King; and on the 3d of July, 1724, had the bond restored to him, which the said *E. Paunceford* had given to the King; and it was insisted, that this obligation was made for the benefit of *Paunceford* himself, and the King's prerogative ought to be used only for the debts. It is said by Chief Baron *HALE*, that it would be unreasonable, inconvenient and mischievous to the subject, to make the King's prerogative instrumental for obtaining the debts of the subject; and by a rule; Jac. 2. 1687. no extent shall issue where a bond is not due and brought in o Court, and affidavit made, that the debt to the King is still due; and it was also said, that an extent shall not be upon an obligation with condition, without *scire facius*. Sav. pl. 95.

Hard. 404.

a Leon. pl. 74.
Owen 46.

And on the other part it was insisted by the Attorney General and others, that an extent shall issue upon a bond, as here; and so it was adjudged 1721, between *The King* and *Yale*, referred to the Chief Justices *PRATT* and *KING*, and afterwards affirmed in Parliament, where the condition was to the same effect as this is; if a man be bound to the King with sureties, and the principal prove insolvent, upon which the sureties pay the debt to the King, it would be very mischievous if they could not have the prerogative process against their principal.

[390] If monies due to the King are delivered to a common carrier, who loses or imbezils them, extents shall issue against him for the recovery of these monies; and if the receiver die indebted to the King, and his executors pay the debt, they shall have the prerogative process for the recovery of the debts due to their testator; as to the case *Hardr. 404.* it was mentioned by Chief Baron *HALE* in regard of debts in aid, and the rules made 3 Jac. 2. were never inrolled, and regard only extents in aid. But it was never doubted before, that if a man be indebted by bond to the King, an extent might issue before it be proved that the debt remains unsatisfied.

And it was agreed by the Court, if a man be receiver for the King, and employ others as his agents or deputies, that he can take their obligation in the King's name for the king's monies which shall come to their hand, and to me it seems that it was never denied that if it be added to the

De Term. S. Mich. 13 Geo. 1.

the condition that they shall account also to the receiver for the proper monies that they have received, that this should not vitiate, but if the obligor imbezils or converts the King's monies, an extent shall be issued upon such obligation.

It was also agreed, that if a common carrier imbezel the King's monies, extent may issue against him; so if the principal debtor to the King fail, and his sureties pay, it was agreed by Baron CARTER and myself, and not denied by the others, that the sureties shall have the prerogative process against the principal.

But in the principal case this rule was discharged, upon consideration chiefly of the circumstances of this case; for when this obligation was made 1715, by which *Nath. Clark* was bound to pay each day such sums, &c. as he should receive, the monies then due were converted by him many years past; and after an account was settled between *Paunceford* and *Clark*, and the monies due to the King by *Clark* were paid by *Paunceford*, and he had his security given to the King cancelled and restored to him, and then took an obligation of *Clark* for the balance upon that account, so did not rely upon the bond given by *Clark* to the King.

And the Chief Baron added, that by the condition of the obligation *Nath. Clark* was not bound to pay to the King or account to the King, for the monies by him received, but to pay to *Paunceford* and account to him, not only for the King's monies, but also his own proper monies, and therefore the King's name seems to be used solely on trust for *Paunceford*, but the King cannot be trustee for another person.

[391]

Evans and Viscountess Dowager Fauconberg. In Scacc'.

In Case 193

If defendant pleads "*nil habuit in tenementis*"

DEBT for rent, and plaintiff declared, that by indenture of the 27th of Sept. 1723 he demised to the defendant a messuage in Bond-street for seven years at 160l. per ann. by virtue of which demise defendant entered, and was from thence in possession to the day of the feast of the annunciation of the Blessed Virgin 1726, and for a year's rent due at the said feast this action was brought, &c.

Defendant

to an action of debt for rent brought upon an indenture of lease for seven years, it is a good cause of defence.

De Term. S. Mich. 13 Geo. 1.

Defendant pleaded, that before the demise, viz. 24 Jan. 1722, the plaintiff was possessed of the same messuage for the term of 99 years to come, and the same day assigned his term to *Anne Colwell*, who afterwards, viz. 25 July 1723 entered, and was and is still in possession; and this she is ready to prove; to which the plaintiff demurred, and shewed for cause that the plea doth not confess and avoid, nor deny the matter in the declaration, that it doth not shew expulsion of the defendant, and that it is argumentative. &c. Defendant joined in demurrer.

And it was argued by Serjeant WHITAKER, that the plea is a special *nil habuit in tenementis*, and therefore the plaintiff ought to have replied, and relied upon the estoppel, and not demurred. Co. Ent. 103. Hob. 200. And perhaps plaintiff had an interest, and therefore defendant might confess and avoid. Co. Lit. 47. Cro. Eliz. 700. *Sed non allocatur*; for upon a plea of general *nil habuit in tenementis* plaintiff might demur, where the estoppel appears in his declaration. 3 Lev. 146, 156. 1 Salk. 277. *A fortiori* in a special *nil habuit*, &c. and defendant here does not shew that plaintiff had an interest that could be avoided, and also the defendant did not answer to the possession as he ought. 2 Vent. 67. And therefore judgment was given for the plaintiff.

[392] Co. Lit. 47. Cro. Jac. 312. 9 Co. 60. Cro. El. 362, pl. 24. Skinn. 49. 1 Stra. 611. 2 Ld. Ray. 1154. Moor 323. 405. Lutw. 510. 2 Co. 4. 5. Cro. El. 122, 756, 769. 1 Roll. abr. 872. 2 Roll. abr. 454. Poph. 114. Owen 110. 2 Co. 33, b. Allen 52. Stra. 610, 818. 3 Bac. abr. 441. Dougl. 159. 1 Term. rep. 86, 701. 2 Term. rep. 171.

Case 194

Bokenham and Bentfield. In Scacc'.

Lease of parson void for non-residence, when pleaded to a bill brought by lessee for tithes. See stat. 21 H. 8, c. 13. See 14 El. c. 11. 1 Bulst. 112. 1 Leon. 100. Cro. El. 123, 490. 7 Black.

BILL by lessee of the parson of — for tithes against the defendant, a parishioner; to which the defendant pleaded the statute 13 Eliz. ca. 20. by which it was enacted, that no lease of any benefice or ecclesiastical promotion with cure, or any part thereof, shall endure any longer than while the lessor shall be ordinarily resident, and serving the cure of such benefice without absence above 80 days in any one year, but that lease immediately upon such absence shall cease and be void, &c. and that the lessor was absent above 80 days in such year, whereby his lease to the plaintiff did become void; and the plea being admitted to be heard according to the rules of court, no one then appeared

De Term. S. Mich. 13 Geo. 1.

peared to defend or maintain the title of the plaintiff, for it was said by the counsel for the defendant that such plea was formerly allowed, that it was allowed 5 Feb. Hil. 12 Geo. between *Mills* and *Etheridge*.

That it was allowed also Pasch. 12 Geo. between *Quinter* and *Messendon*, and between *Quinter* and *Downes*, that the sole question in those cases was, if the defendant should not answer to the quantities and values alledged by the bill at the same time he tenders his plea, so as where the defendant insists on a modus as a discharge of his payment of tithes in specie, yet the defendant ought to answer to the quantity and value of the tithes charged in the bill: otherwise if it were afterwards found there was no such modus, the plaintiff cannot have decree against the defendant, because it does not appear how much is due by him for his tithes to the plaintiff. But it was then resolved by the Court, that upon such plea of non-residence of the lessor the defendant need not answer to the quantities and values, for such plea goes to the right and title of the plaintiff, but where modus is alledged, that admits the title of the plaintiff, but where modus is alledged, that admits the title of the plaintiff to take tithes of the defendant, but only goes to the manner of payment, if tithes should be paid in specie, or not.

And upon all those authorities alledged, the plea in the present case was allowed.

Com. 190.
Moor 270.
Sed vide
2 Lev. 61.
1 Vent. 244.
3 Keb. 46,
107, 193.
3 Bac. abr.
396, 371.
Con ra
Cowp. 129,
429.
2 Term.
Rep. 749.

[393]

Harrison and Hart and Franks. In Scac'.

Case 195

BILL for an account of the produce of 20000l. *South Sea* stock transferred by the plaintiff to the defendant *Hart*, for the security of 70000l. and interest, and after deduction of principal and interest, that *Hart* pay the balance to the plaintiff, and also that the defendant *Franks* shall account to the plaintiff for the said 70000l, which was paid to him to be disposed of for the use of the plaintiff.

And the bill suggested that the plaintiff applied to the defendant *Hart* 25 May 1720, for a loan of 30,000l. who advanced that sum to the plaintiff, and for security the plaintiff agreed to give his bond, and also to transfer to him 10000l. *South-sea* stock, and accordingly the plaintiff was bound the 25th of May 1720, in a penalty of 60,000l. under the condition that the plaintiff pay to *Hart* 30,000l. on the

An account directed for all monies received on the sale of stock pledged, notwithstanding the day of redemption was past; it not appearing that the defendant had sufficient stock at the day.

the 25th of September next with interest, after the rate of 5l. per cent. being the same sum mentioned in a defeazance of the same date made between the plaintiff and defendant *Hart*.

[394]

That the same day the plaintiff transferred to the defendant *Hart* or his order 10000l. South-Sea stock, and by a defeazance dated the 25th of May 1720, between defendant *Moses Hart* on the one part, and plaintiff *Thomas Harrison* on the other part, reciting the said obligation and transfer, it was agreed that the 10000l. stock so transferred was transferred to the intent that the same shall and may remain and be as and for a collateral or further security for the more sure payment of the said sum of 30000l. according to the condition of the said bond.

And by the same deed, defendant *Hart* covenants that if the plaintiff shall pay the said 30000l. &c. he will on payment of the said sum transfer the said 10000l. stock to the plaintiff and deliver up the bond.

And plaintiff covenants that he will pay all calls, &c. upon the said stock, till payment of the money became due, and authorises defendant (if money be not paid) to sell and dispose absolutely of the said stock, and keep the monies arising by the sale towards payment of the said sum of 30000l. interest and charges, returning the overplus, which defendant agrees to do.

And it is agreed that all gains, dividends, interest and advantage, which shall arise by reason of the said stock in the said company from the date hereof, shall be for the only use and benefit of the plaintiff, unless default shall be made in payment of the said 30000l. &c.

And if the stock of the company, before the 30000l. shall grow due as aforesaid, shall fall in value, so as to be sold at or under the rate of 350l. per cent. in *Exchange-Alley*, the plaintiff on three days notice shall give further security, &c. or in default thereof it shall be lawful for defendant *Hart* to sell the said stock, and keep the money arising by sale towards payment of the said 30000l. though not then due, according to the bond, returning the overplus, if any, to the plaintiff.

That the defendant 10th of June 1720 advanced 40000l. more to the plaintiff who gave his bond in 80000l. with condition to pay, &c. on the said 25th Sept. and another defeazance was executed in the same terms as the former, save that power of sale was given if stock lessened to 500l. per

per cent', &c. That the defendant *Hart* after disposed of this stock for great prices, for which he ought to account; that the whole 70000l. was paid into the hands of defendant *Franks*, for which he ought to account to the plaintiff. [395]

The defendant *Hart* by his answer confesses the loan of 30000l. the 25 May 1720. and the bond and defeazance accordingly; and another loan 10 June 1720. and the bond and defeazance accordingly; and saith, that he hath, and always had in his own hands, or in the hands of others in trust for him, sufficient stock to answer the plaintiff's demands, which, the defendant kept on purpose, without making any sale or disposition thereof, ready to be transferred to the plaintiff or his order, when he should require, on his payment of the 30000l. and 40000l. and interest, &c.

And by his second answer to the original bill, and three other answers to the amended bill, it appears, that on the 25th of May 1720. when the first loan was made the transfer of the first 10000l. by the plaintiff was in the manner,

2000l. was transferred to <i>Benj. Collier</i> for 9600l.	} 24040
2000l. to <i>Rob. Sawbridge</i> at 482l. per cent', 9640l.	
1000l. to <i>Wolfe</i> ——— at 480l. per cent', 4800l.	
5000l. to defendant <i>Hart</i> himself, who paid to plaintiff only	} 5960

30000
That on the second loan 10th of June 1720. the transfer of the second 10000l. South-Sea stock was made by the plaintiff in this manner, viz. 1000l. to *Robert Mann* at 745l. per cent'.

	For 7450l.	} 22200
1000l. to count <i>Nassau</i> , at 735l. per cent', for 7350l.		
1000l. to <i>John Mark</i> , at 740l. per cent', for 7400l.		

That the remaining 7000l. was transferred by plaintiff, or order, to *Moses Hart*, who paid

40000

And it appears by the depositions of *James Travers* and *Benjamin Periam*, two witnesses examined in the cause, that *Moses Hart* had raised by the sale of the 20000l. South-Sea stock transferred to him by the plaintiff 25 May and 10 June 1720. the full sum of 86291l. 17s. 8 d. [396]

Viz.

De Term. S. Mich. 13 Geo. 1.

Viz. By sale of 5000l. to *Collier, Saw-* } 24040
bridge and Wolfe,

By sale 30 May 1720, of 4000l to *Jac.* }
Sawbridge, at 520l. per cent', of which }
3659l. os. 4d. was the plaintiff's stock, } 19026 17 8 4
(for he had only 340l. 19s. 8d. of his own }
proper stock) the sum of }

By sale 3 June 1720 of 500l stock }
of the plaintiff's, at 520l. per cent', (for }
the defendant had then no other stock in } 2700
his own name) }

By sale 10 June, as above, to *Mann,* } 22200
count Nassau and Mark, }

By sale 15 June 1720, to *William Dale* }
500l. at 750l. per cent. for *M. Hart* had }
not stock in his own name, only 1000l }
purchased of lord *Grimston* for 8000l. of }
which he had sold 100l. to *Cha. Goodwin,* } 3750
and 400l. to *Bart. Zolocastre* 10 June 1720. }
and then sold 1000l. to *William Dale,* of }
which 500l. must be of the plaintiff's }
stock, }

By sale 15 June to *Hen. Hankey* 1000l. }
at 700l. per cent'. } 7000

By sale 20 June to *William Bateman* }
500l. at 65l. per cent', } 3825

And *Jo. Barker* 500l. at 750l. per cent', } 3825

Total 86291 17 8 4

[397] So by the depositions of the same witnesses it appears,
that defendant *Moses Hart* had in his own name upon 25
May 1720, no stock, except 340l. 19s. 8d. and the annu-
ity stock.

That upon the 25 Sept. 1720, he had no stock in his
own name, except 20885l. 1s. 7d. and the annuity stock.

That 4400l. part of the 20885l. 1s. 7d. was pledged to
Hart by lord *Hillsborough*.

That 9100l. another part of the same, appears to be in
trust for the South-Sea company; for on the 16 Sept. 1720.
the sum of 48140l. was delivered to *Hart* by *Robert Knight*,
cashier to the South-Sea company, with intent to purchase
stock for the use of the company, and that *Hart* with this
sum made a purchase of 9100l. South-Sea stock, and the
27 Sept. 1720, 9100l. of this stock was transferred by *Hart*
to the South-Sea company.

De Term. S. Mich. 13 Geo. 1.

So by the depositions of *William Walmsley*, another witness, it appears that Lord *Newburgh* said to him 24 Aug. 1720. in *Exchange-Alley*, that *Hart* had purchased 2000l. South Sea stock for him of *Ijaac Fernandez Nunes* at 85ol. per cent', to be transferred the next transfer-day after Michaelmas, and for his security upon the 26 Aug. 1720. the aforesaid Lord transferred to *Hart* 1000l. South-Sea stock in trust for himself, and in a short time after the expiration of the time to perform the bargain the said Lord *Newburgh* gave satisfaction to *Hart*, who detained the 1000l. stock in part thereof.

By the deposition of Sir *William Stapleton* it appears, that 23 June 1720. he purchased of *Hart* 1000l. South-Sea stock, and of *Walter* 600l. South Sea stock, at 1000l. per cent', which *Hart* took to himself upon the 27 Sept. at 400l. per cent'.

By the deposition of *Tho. Edwards* it appears, that *Hart* upon the 20 Aug. 1720. purchased for him 500l. South-Sea stock, at 80ol. per cent', and kept it in trust for him for two years following, when *Hart* took the same stock for part of the monies due to him by *Edwards*; which several parcels of stock, viz. 4400l. 9100l. 1000l. 1600l. and 500l. with midsummer dividend for the two last parcels, amount to 16810l. and reduce the stock, which defendant *Hart* had in his own right upon the 25 Sept. 1720. to 4075l. 1s. 7d. [398]

By the deposition of *Geo. Harrison*, brother to the plaintiff, it appears, that upon the 19 Aug. 1720. *Hart* contracted to sell him 1000l. South-Sea stock at 91ol. per cent', to be transferred to him within a month after the next opening of the books, and deposited for security of his performance of the contract one subscription receipt of the value of 3000l. and *Hart* also had contracted to deliver to the Lord *Newburgh* the 2000l. stock mentioned in the deposition of *William Walmsley* for 85ol. per cent', upon the 22 Sep. 1720. and to Col. *Lumley* another 2000l. at the same time, and for the same price.

That by the statute of 6 Geo. enabling the South-Sea company to increase the capital stock, power was given to the company to take in the annuities, &c. and by a resolution of the 19 May 1720. the company agreed to make allowance for each 100l. of long annuities, subscribed before the 27 May 700l. per cent', and 575l. in monies, and South-Sea

De Term. S. Mich. 13 Geo. 1.

South-Sea bonds, and for each 98l. per annum of the 14l. per cent' annuities, and 511l. in monies and bonds.

That *Hart* upon 28 April 1720. subscribed 1460l. per ann. of the long annuities, and 1040l. per ann. of the 14l. per cent', and by the hands of *Edward Harris* 200l. per ann. long annuities, and by the hands of *Wymondsell* the same sum, for which he was allowed 700l. per cent', viz.

	l.		
For 1860l. long annuities,	13020		
1040l. of 14l. per cent',	7428	11	5
Midsummer dividend,	2044	17	1

In all 22493 8 6

[399] That by an order of the South-Sea company, the books were not opened for transfer of the South-Sea stock till the 5th of Oct. 1720.

And on the part of the defendant *Hart* it was proved by the deposition *Lazarus Simon*, *Moyer Wagg*, and *Isaac Franks* the other defendant, that on or about the 10 June 1721. the plaintiff discoursing with defendant *Hart* (who said, that perhaps he could not re transfer to him at the time agreed, the 20000l. stock in other than annuity stock, having sold to others the said 20000l.) declared, that he well knew he could not have the same stock, and would be content with annuity stock, for he did not regard which stock he had, and knew well the sufficiency of the defendant.

That annuity stock was equal in value to the other, and was apprehended to be transferable before the 25th of September, and some parcels were actually transferred before the said day.

And *Franks* added, that since the loan of the said sums, when stock was considerably advanced in price, the defendant *Hart* advised the plaintiff to sell all his stock, by which he would acquire a great estate, and therefore offered to him to deliver the whole 20000l. stock, with the dividends, but the plaintiff refused, saying, that stock would rise to the price of 1500l. or 2000l. per cent'.

And *Simon Lazarus* added, that he being directed by Sir *John Lambert*, a director of the South-Sea company, to purchase stock, offered to the plaintiff to give 900l. per cent' for all the 20000l. that *Hart* had of him, and to take the security which was given to *Hart* for it.

And *Isaac Helbert* added, that he offered to *Hart*, by order of *Knight* and *Grigsby*, for all his stock, annuity stock and

and other stock, 950l. per cent. who refused to depart with all his stock by reason of his engagement with the plaintiff.

As to the defendant *Franks*, he admitted by his answer [400] that he received for the use of the plaintiff the 30000l. and 40000l. of *Hart*, and such others, to whom the plaintiff transferred the 20000l. stock, but saith, that he disposed of it pursuant to the orders of the plaintiff in South-Sea stock or subscriptions, and from time to time gave to the plaintiff an account in writing how he had disposed of it, which writing the plaintiff perused, and it was left with him, and after declared his approbation of the account; and after all the monies disposed of for the plaintiff, a balance of 56l. remained due to the defendant *Franks*, which was demanded of the plaintiff, who admitted such sum due, and promised payment; that by fire the 17th of January 1723. all his papers and accounts were destroyed or lost, wherefore he could not account.

And it appeared, that *Franks* was not made defendant to the original bill of the plaintiff filed Michaelmas 1721. but afterwards in Michaelmas term 1722. *Franks* was made one of the defendants.

And by the deposition of *Abraham Solomon*, who was employed to purchase the stock and subscriptions for the plaintiff, it appeared, that he delivered an account to the plaintiff in writing of all the sums for him expended, and of all the stock or subscriptions for him purchased in the South-Sea company or other companies, and apprehended the account was just; that the plaintiff perused them, and about two days after the delivery of each account the plaintiff declared, that he had inspected, and was satisfied; and *Abr.* and *Benedict Solomon* testify, that the plaintiff promised payment of the monies demanded as the balance due upon those accounts to the defendant *Franks*, and the sum demanded exceeded 50l.

Upon this case it was insisted by the Attorney General, and other counsel with the plaintiff, that the defendant *Hart* ought to render account to the plaintiff for all the monies which he had raised by the sale of any part of the 20000l. alleged to be transferred to him by the plaintiff, and after deduction of the principal sums and interest, to answer for the residue of the profits to the plaintiff. [401]

First, This seems agreeable to the nature of the transaction, for when a pledge of stock is made by the plaintiff to the defendant, it is consonant to law and reason that the defendant

defendant shall render to the plaintiff upon mutual payment of monies the stock and all the profits arising from it. If a man distrain his tenant and labour the distress, he shall give damages to the party to the value of the labour.

So by the civil law the fruit and profit arising from a thing in pledge ought to be accounted for to the debtor, and after deduction of its principal and interest, the surplus arising from the sale of the pledge ought to be restored to him. Domat. 1 Vol. 345. De Deposito L. 3. All that shall arise or accrue from the thing that is mortgaged, or that shall augment it, accrues to the mortgagor. So Tit. 3. §. 15. *Cum sortis nomine & usurarum aliquid debetur ab eo, qui sub pignoris nomine pecuniam debet, quicquid ex venditione pignoris recipiatur primum usuris quas jam tunc deberi constat, deinde si quid superest, sorti accepto ferendum est.*

So in the case of a mortgage the mortgagee shall answer for all casual profits; if a man pledge a diamond for 100l. and it is sold for 500l. shall not he have an account given him of the surplus? By common law he that receives a pledge has no other property in it than to detain it till his debt is paid, nor can he use or sell it. 2 Cro. 244. So by the canon law. Lind. 60. The canon of pledges saith, *Inhibemus ne pignus retinere quispiam contendat postquam de fructibus sortem perceperit, deductis expensis, quoniam usura est.*

[402] And it seems to be confirmed by a resolution in this court, in the case between *Mercer* and *Tutt*, which was afterwards affirmed by parliament upon an appeal 2 March 1725. *Mercer* had borrowed 1100l. of *Tutt*, and for his second subscription N^o 195. and it was agreed that if *Mercer* paid the money *Tutt* should restore the subscription, and if he did not pay it, that *Tutt* might sell; afterwards *Tutt* sold the subscription; whereupon *Mercer* exhibited his bill in this court for an account of the money raised by the sale. The defendant insisted, that he had preserved another second subscription N^o 194. in lieu of that; and upon debate concerning the subscription pledged, trial was directed, and verdict found for the plaintiff; whereupon an account was decreed.

So in the case of *Merrick* and *Spark*, Mich. 1723, stock was mortgaged by *Merrick* for 1000l. the mortgagee after this mortgaged it for 1000l. whereupon *Merrick* exhibited his bill for an account of the overplus, and an account was decreed.

Secondly,

Secondly, This was the exprefs agreement of the parties, for by the defeazance it is said that the stock shall be and remain a further security for payment, which shews the intent was not that it should be sold, for then it would not continue a security, and it was pledged only as a collateral security for the obligation, which was principally intended for the security of the defendant.

Therefore by the defeazance defendant *Hart* covenanted upon repayment, &c. to transfer the said stock to the plaintiff, and the plaintiff covenanted to pay all calls upon the said stock; but if the stock was intended to be sold it could not be transferred to the plaintiff, nor could there be any calls upon it; and it appears more fully by the covenant and agreement, which says that all gains, dividends, &c. arising by the said stock shall accrue to the plaintiff, and by the subsequent covenant, which shews in which cases it should be sold, viz. if it fall to 350l. but in that case the defendant is to account for the overplus, and when the parties expressly agreed that upon such diminution in value it shall be sold, and that in such case the defendant ought to account for the sale, it can never be intended that in any other case it may be sold without account. If the plaintiff ought to have an account of the profits that arise from the sale, when the sale was allowed by the consent and agreement of the parties, shall it be said that he is not accountable for the sale when sold by himself, and in breach of the trust reposed in him?

[403]

Thirdly, This construction of the articles is very reasonable; for if the plaintiff would sell the stock, he might have sold it himself; it would be very dangerous that he to whom the stock is pledged might traffick with it; where should the stock have been found if the defendant had become a bankrupt? Whilst the specified stock remained in his hand, the plaintiff in case of bankruptcy could resort to it and take the stock out of the hands of the commissioners or assignees, but if it be sold, what remedy shall he have? And it is therefore necessary that the party be strictly bound to his agreement. The agreement in writing should always be the rule of the action, but is more necessary in things which fluctuate in the manner that stock fluctuates, and is more requisite in the case of a broker, who by act of parliament is to be sworn and ought not to intermeddle with stock, and therefore when he acts contrary, he ought to be strictly obliged to the letter of his agreement.

Fourthly,

Fourthly, If it be said the agreement in writing is varied by the subsequent transactions, because the plaintiff himself transferred part of his stock to others, therefore the defendant *Hart* reserved other stock for the performance of his contract. It does not appear that he apprehended the persons to whom the plaintiff transferred his stock were other than trustees for *Hart*; and plaintiff by his answer swore he took them to be his trustees; but if it made any variation, can an agreement in writing be varied by word?

[404] Fifthly, As to the allegation that *Hart* reserved equal quantity of stock at all times, out of which he could answer to the plaintiff, it was agreed by Mr. *Cowper* that if the allegation was true, it was a good answer; for if a man having 10000*l.* takes other 10000*l.* on pledge, and then disposes of 10000*l.* only, it is not any inconveniency to the party, and it cannot be known if the plaintiff's stock be transferred or his own stock.

But it was insisted, that upon the 25th of May 1720 defendant *Hart* had only 340*l.* in his own name, and upon the 25th of Sept. 1720, although he had 2088*l.* in his own name, yet he was only trustee for others as to the greatest part of it, and the annuity stock ought not to be regarded, because it was not transferrable till the fifth of October 1720, and therefore could be of no use to answer the demand of the plaintiff upon the 25th of September preceding.

Sixthly, The defendant *Hart* himself was conscious that he had sold the plaintiff's stock contrary to his agreement, and that he had not sufficient stock of the same nature whereby he could answer the plaintiff, as it appears by his varying defences and his varying answers; for by his first answer he saith that he has always had in his own hands or others in trust for him sufficient to answer the plaintiff's demands, which he kept on purpose, without making any sale or disposition thereof, ready to be transferred to plaintiff or his order; by which every one sees the intent was, that the defendant should have all the while stock sufficient to answer to the plaintiff 20000*l.* stock pledged by the plaintiff, and that he never had sold or disposed of any part of this stock.

But by his second answer the contrary appears, for then he confesses he had sold the plaintiff's stock immediately after the transfer to him, and that he had no stock of his own, only 340*l.* 1*9s.* 8*d.* which he immediately disposed of, and

and had no proper stock for a long time; but then by his third answer, he makes his refuge to the annuity stock, for he says, he had subscribed in South-Sea stock the 28th of April his annuities, for which he was allowed in the South-Sea company 20448l. 11s. 5d. which with the Midsummer dividend was augmented to 22493l. 8s. 6d. and that he had also other stock in his own name to the value of 20885l. 1s. 3d. but upon examination it appeared the annuity stock was not transferable till the 5 Oct. and that his other stock was for the most part in trust for others; and that for the residue he had made contracts for sale of that to others, so that he had no stock, or only a very small quantity of stock, upon the 25 Sept. with which the plaintiff could be satisfied; and this matter being manifest, he by his fourth and fifth answer would resort to the act of parliament, by which he says, that the annuity stock was in its nature transferrable from the time it was transcribed to the South-Sea company, by force of the statute 6 Geo. [405]

As to the other defendant, it was urged by the Attorney General and others of counsel with the plaintiff, that it was a plain case that *Franks*, who had received 70000l. for the use of the plaintiff, as he himself admits, should be accountable to the plaintiff for that sum.

And his pretence, that he had given the plaintiff an account each day in writing to him delivered, that does not amount to a stated account, and an account current never was allowed to be a bar to a bill exhibited in equity against any person to have an account.

And his excuse, that he had lost his books and papers by the fire Anno — is a mere subterfuge; for although his first answer was sworn to after such fire, yet he makes no mention of his books then lost till his second answer; and if it were true, yet it is no bar to the account, only it shall be an argument for a special direction of the court for the manner in which his account shall be taken.

But by Mr. REEVES, and others of counsel for the defendant *Hart*, it was insisted that the defendant *Hart* was not accountable to the plaintiff for the monies raised by the sale of this stock pledged and transferred to him by the plaintiff; but the bill of the plaintiff to such intent ought to be dismissed, for the arguments deduced from the canon and civil law are not material, to which stocks could not be known; but by common law, which is the most proper guide in this case, the pawnee has a special property in the goods

[406]

Litt. Rep.
332.
Keilw. 82.
Owen 124.
Ante. 133.

goods pledged to him, and may sell them, if it be without prejudice to the pawner. 2 Salk. 522. And if he be robbed, he shall have an action against the pawner for the monies lent to him, for he is not bound to take more care than of his own goods. In the case of *Cogs* and *Bernard*, 2 Annæ, B. R. Salk. 523.

And therefore this case cannot be like a mortgage of lands, which naturally produce profits, which are intended for the satisfaction of the mortgagee; but stock is only an equitable interest, out of which no profits arise, only the dividends or interest; the casual advance of the price is the effect of fancy, for it has no intrinsic value; and therefore the plaintiff who is not party or privy to the transaction in the traffick by sale of the stock, as he will not be charged with any damage that *Hart* might thereby sustain, therefore he shall not answer to him for the benefit or gain.

In the case of *Mercer* and *Tutt*, the second subscription N^o 194, and the second subscription N^o 195, were both sold; but N^o 195, was sold for a great sum; and the defendant would have given him the monies obtained by the sale of the N^o 194, and placed his defence upon this, that this number was the subscription pledged to him by the plaintiff, and that being found by verdict to the contrary, the defendant was decreed to answer for the N^o 195.

The case of *Merrick* and *Spark* was a mortgage made of land, and doth not come up to the present case; nor can any case be shewn in which the court hath ordered an account of the disposition of stock, that was allowed to be disposable in its nature.

As to the contract in this case, it doth not appear to be the intent of the parties, that *Hart* should be restrained from the disposal of the stock of the plaintiff transferred to him.

[407]

For although stress is laid upon the words of the agreement, yet the words are not to be regarded; for it appears to be a printed form, and not drawn to answer the particular intent of the parties at this time; but by the words of the agreement it cannot be collected, that the same numerical stock should be transferred to the plaintiff upon the 25 Sept. which was transferred by him the 25th of May, without variation; the same in quantity and quality satisfies the words, the same shall remain and be as and for a collateral and further security of the said 30000l. and that upon payment, &c. he shall transfer the said stock to the plaintiff, &c.

&c. and by the same argument it may be said, that the same numerical money shall be repaid, for the words are for repayment of the said sum of 30000l. and although *Hart* covenanted to answer for all the dividends, &c. it imports only he shall answer for the stock given in pledge, with all augmentation of the value, for the dividends, &c. are equally allotted to all the stock in that company, and makes each share so much more in value; and although liberty was given to sell the stock when the price should be diminished to 350l. per cent. the intent was, that the defendant then might make an absolute disposition of all stock the plaintiff ought to have upon the 25 Sept. and that then he shall account for the monies such sale produced, not that the defendant should be restrained from negotiation with the stock of the plaintiff in the interim.

And it cannot be collected, that the plaintiff intended to restrain the defendant from negotiation with the stock to him transferred, by any part of the transaction between them; for the plaintiff himself 25 May transferred 5000l. stock (part of the 10000l. made security for the 30000l.) to *Collier*, *Sawbridge* and *Wolfe*, to whom *Hart* had sold some stock before; and the plaintiff himself signed the receipt to them for the monies paid by them for the 5000l. so sold; and in the same manner plaintiff himself 10 June transferred 3000l. part of the second 10000l. Stock to *Mann*, *Nassau* and *Mark*, to whom defendant *Hart* had before sold so much stock, and plaintiff himself signed the receipt for the monies by them paid for such stock to them respectively sold; which shews the plaintiff knew well that his stock transferred was not to be kept by *Hart* in his own name; and although it be then pretended the plaintiff conceived those persons to whom the plaintiff transferred his stock to be trustees for *Hart*; yet it seems impossible to be conceived when the stock was not transferred to them, but they paid also for it; and the payment was made to the plaintiff himself, who gave to them his receipt for the monies; and it all amounts to a demonstration, that those persons could not be taken for trustees for *Hart*; and if it be considered at what time the loan of this great sum was made to the plaintiff, without any premium, only the interest at 5l. per cent. it cannot be imagined that the stock was intended to be useless for so long a time; the plaintiff did not expect his stock until the 25th of September, and it was indifferent to him in what hands it was during that time, if he had so much stock on such a day.

[408]

De Term. S. Mich. 13 Geo. 1.

Moor 105,
727, 728.
Wing. Max.
15. 1 Brow.
132. Stile.
293. 2 Leon.
217 Swinb
108. Hob.
32. 1 Salk.
7. 8. Co.
15. a. Br.
Nelm. 63.
Cro. El 531.
Br. Fine.
28. Fitz.
Feoff. 56.
Kelw. 49.
1. 1 Buist.
62.

And the words are stronger, for it doth not say on or before the 25 Sept. but on the 25 Sept. and therefore if the plaintiff had so much stock transferred to him at such a time, it sufficeth; and although it be objected, the agreement in writing cannot be explained by words in evidence; yet it is always allowed to take into consideration the circumstances of the case by the exposition of a fact. Between *Wilkins* and *Elkin* agreement was made to take lease for nine years, and that the lessee should pay 9l. for rent; trial was directed, to know the value of the land; and upon that it was decreed the lessee should pay 9l. a year, and not 9l. for the whole term; though the words are so in Lord *Cheyne's* case, 5 Co. 68. Where a man had two sons named *John*, he devised lands to his son *John*; proof may be admitted to shew which son was intended. So if a fine be levied of the manor of D. and there be two manors of the same name. Pl. Com. 856. 2 Rol. Abr.

[409]

Then if *Hart* by the intent of the agreement was not prohibited the sale of the stock, so that he had sufficient to reassign to *Harrison* upon the 25 Sept. here it appears plainly that he had sufficient at that time, for he had annuity stock sufficient without doubt; and though by order of the South-Sea company the stock allowed for annuities, &c. subscribed to the company, was not to be transferred till the 5 Oct. yet it was in its nature transferrable; and then the order of the company cannot controul. The South-Sea company was erected by statute 9 Annæ 21. and every proprietor of any share in joint stock of the company had power to transfer his share to another; then by the statute 6 Geo. when proprietors of annuities have subscribed, the same proprietors were to have and enjoy such shares as were allowed them by the company, in lieu of money for the annuities, &c. by them subscribed, and in respect of such shares were to be taken as members of the company, and shall in proportion to the same shares be intitled to the same benefits, powers, privileges and advantages, as other members of that company ought to enjoy in respect of their shares of the capital stock; and all such proprietors from the time of their agreeing by contract, subscription or otherwise, to accept such stock in lieu of their annuities, &c. shall have credit in the books of the company for their proportion or share in the stock of the corporation, and in all dividends and advantages to attend the same.

And

And therefore the annuity stock, being subscribed in the time limited by the act, ought to have all the advantages allowed by the act that the original South-Sea stock had, and by consequence was sufficient to answer to the plaintiff for the stock pledged by him to the defendant.

But if this annuity stock was not sufficient for such purpose, yet he had other stock in his own name to the value of 2088*l.* 1*s.* 7*d.* out of which he could satisfy to the plaintiff the 20000*l.* by him pledged upon the 25 Sept. 1720. and although he was under contracts with others, and had purchased part of this stock with an intent to transfer it to the South-Sea company, and it was transferred accordingly; yet upon the 25 Sept. all was at his disposal, and if he had transferred it to the plaintiff, no other had demand upon it against the plaintiff, nor could pursue his remedy against the plaintiff in law or equity, to recover any part of the stock so transferred to the plaintiff; and it is not to be omitted, that it appears by several depositions, that the plaintiff himself always declared he should be content with annuity stock.

And there is one circumstance considerable in a court of equity, that the defendant *Hart* had persuaded the plaintiff to sell his stock when the price was at 900*l.* per cent. and had offered him to furnish all the 20000*l.* stock at such a time, and that defendant *Hart* was offered 950*l.* per cent. for all his stock, but refused to take that price, in regard he was obliged to retain 20000*l.* for the demand of the plaintiff the 25th of September 1720.

[410]

As to the defendant *Franks* it was insisted by Mr. LEE, Serjeant SHEPPARD and others of counsel with him, that as to the charge that he was confederate with defendant *Hart* it was denied by the defendant, and not proved by the plaintiff; and for all the rest upon the second charge against him, that he ought to account for the several sums which he admits to have received for the plaintiff, viz. the 30000*l.* and 40000*l.* as to that the defendant by his answer says, that he had disbursed all those sums for the use of the plaintiff, and had given to the plaintiff from time to time an account in writing how the defendant had disbursed those sums, which the plaintiff had inspected and approved, and after declares that a balance of 56*l.* remained due to the defendant *Franks* upon this account, for which sum he, the plaintiff, acknowledged himself indebted to defendant *Franks*, and promised to pay that balance to him.

And

And such general answer sufficeth where the charge by the bill is so general, for the bill charges that the defendant had received those monies, and had disbursed several large sums in the purchase of South-sea stock and subscriptions, but some part remained not disbursed, by which the plaintiff admits that the defendant had discharged part of those sums, and yet demands an account of the whole, and doth not specify for what part he had accounted, and for what part he had given no account.

[411]

And especially when the defendant acts as servant or agent for the plaintiff, and if the plaintiff employ his servant in the purchase of several particular things, who immediately gives an account of his expences to his master, he shall not afterwards demand an account of such particulars. And the bill in this case was not originally exhibited against defendant *Franks*, but against the defendant *Hart* only, but after, when *Franks* was to be examined as a witness for *Hart*, to prevent his testimony the bill was amended, and *Franks* added as a defendant; and after his papers were lost by fire it would be very hard to require a particular account how those sums were disbursed, without charging any error or misprision in the particulars of the account before delivered to the plaintiff.

The court delivered no opinion, but directed an issue to be tried.

And after, upon appeal to the house of peers, this order was repealed, and the lords directed an account for all the monies received by *Hart* upon sale of the stock pledged by *Harrison*, and if the principal and interest were satisfied, the residue of the monies to be paid, and residue of the stock not sold should be transferred to *Harrison*.

Privilege from arrest shall not extend to a person who attends his own cause, after his departure from Westminster.

Harrison, after his attendance in court upon the cause aforementioned, went about 3 o'clock in a coach from Westminster to Chancery Lane with his solicitor and others, to give instructions for procedure in the cause, and there continued till 10 or 11 o'clock, and then was arrested by a bailiff upon a *ca' su'*, upon a *scire facias*, upon a judgment against him in Common Pleas; and now it was moved that he should be discharged, for each party has privilege to attend his cause, and if he be arrested in going or returning, it shall be contempt of the court, upon which the officer shall be punished and the party discharged; but it was not allowed; for here it does not appear that there was any contrivance by the defendants or any concerned in the

the cause to procure this arrest, in which case the court perhaps will extend its power against the procurors; nor does it appear that the officer knew he had attended his cause at *Westminster*, for his warrant was dated before the arrest, and there was another *ca' sa'* taken in Trinity term proceeding, returnable in *London* where the action was brought, and a *testat' cap'* afterwards in *London* the first return of this term before the *ca' sa'* upon which he was then taken, and the arrest here was not in his attendance upon that cause, but he had continued many hours in another place; and if the court should discharge him, how shall the sheriffs be defended against an action for the escape? 1 Brownl. 15. *Wilson and The Sheriffs of London*, in an action for escape, it was said, that the court can discharge if the arrest was in view of the court, otherwise not; and 2 Salk. 644. where a man went to confess indictment in the King's Bench, and was arrested in his journey, the court would not discharge, for he went of his own head; and there is a difference where a man attends upon the court by process and when not.

[412]

The court will discharge where the party goes to make an aff. in a cause. *Jaques v. Warden of the fleet in C. B.* 1788 *The King v. Aylett.* 2 Term. Rep. 60.

Frances West and Mary West, by their Father John West, Esq. Plaintiffs, and Frances Erisey, Mary West and Thomas Barrable, an Infant, by his Guardians, Defendants. In Scacc'. Case 196

BILL was exhibited in September 1725, by which it was alleged, that on a treaty of marriage between *Richard Erisey* and *Frances* the daughter of *Sir Peter Killigrew*, it was agreed by articles 23 December 1685, between *James Erisey* uncle of the said *Richard*, and the said *Richard Erisey*, of the one part, and *Sir Peter Killigrew* of the other part, that in consideration of the said marriage and 1700l. marriage portion, *James Erisey* would settle lands in the counties of *Cornwall* and *Devon*, to the use of *Richard Erisey* for life, without impeachment of waste, and to the heirs male of his body on the said *Frances* to be begotten; and for want of such issue, to the heirs male of his body by any other woman; and for want of such issue, to the heirs female of his body by *Frances*, and after to his heirs female by any other wife; and for want of such issue, to *Charles Vivian*, &c. with divers remainders over. And by the same

Marriage articles shall be carried strictly into execution. 2 P. Will. 349. S. C. 535. 2 Equ. Caf. abr. 39. pl. 2.

- [413] same articles the lands in *Devon* were to be settled to *James Erissey* for life, without impeachment of waste; remainder in part to *Mary* his wife for life; remainder of the whole to *Richard Erissey* as aforementioned; and by the same articles it was agreed that *James Erissey* might nominate counsel for settling the said estates and jointure, and that *Sir Peter Killegrew* might advise likewise with his counsel, so that the same may be effectual in law. By indenture 23 and 24 March 1685, 2 Jac. 2. between *James Erissey* of the first part, *Hugh Boscowen* and another trustee of the second, and *Richard Erissey* of the third part, *James Erissey* in consideration of love to *Mary* his wife, and for confirming and settling her jointure, and for love to *Richard Erissey*, and conveying and settling the lands and tenements after named in his name and blood, and in pursuance and performance of the said articles, conveys the lands and tenements in the county of *Devon* to the use of himself for life without impeachment of waste, then as to the barton of *Erissey*, &c. to the use of *Mary* his wife for her life, for her jointure, and in satisfaction of dower, and as to the said barton, &c. after her decease, and as to the residue of the premises from and after his own decease, to the use of the said *Richard Erissey* for life, without impeachment of waste, and from and after his decease to the use of his first and other sons to be begotten on the body of *Frances* his wife in tail male, and for want of such issue, to the use of his first and other sons by any other wife in tail male, and for want of such issue, to the use of himself and the heirs of his body on the body of the said *Frances* to be begotten; and in default of such issue, to the use of the heirs of his body, and for want of such issue, to the use of *Charles Vivian*, &c. and gave power to himself and *Richard Erissey* to make leases, &c. And by indenture of lease and release 25 and 26 March 1686, 2 Jac. 2. (that were the ensuing days) *James Erissey* settled the lands in *Cornwall* to the use of *Richard Erissey* in possession for life without impeachment of waste, with such remainders as before, and gave him power to make a jointure for another wife, and to make leases, &c. and *James Erissey* covenants for him and his heirs, that the trustees shall be seised to the same uses according to the intent of such leases and estates, and after determination of such leases and estates, to the use of such persons and for such estates, and in such manner, as the same lands were settled before.

[414]

De Term. S. Mich. 13 Geo. 1.

In the deed of this settlement produced several lines were erased, and memorandums made of it.

April 1686, the marriage took effect between *Richard Erissey* and *Frances Killigrew*, by whom he had issue *Mary* only, afterwards married to *John West*, father of the plaintiffs; for the plaintiffs were daughters and heirs of *John West* and *Mary* his wife, the daughter and heir of *Richard Erissey* and *Frances* his wife; and in two years after the marriage *Frances* the wife of *Richard Erissey* absented herself from her husband.

After the death of Sir *Pet. Killigrew* and *Jam. Erissey*, by indenture of the 18th and 19th of January 1697. 9 W. 3. *Mary* late wife of *James Erissey* conveyed to *Richard Erissey* and his heirs, during his life, the premises settled to her for her jointure, in consideration of an annuity for her life pursuant to articles between them 17 Jan. 1627. and afterwards *Richard Erissey* (having the freehold of all the estate in him) did by indenture of lease and release bearing date 25 and 26 April 1698. 10 W. 3. grant and convey the whole estate to two persons, to make them tenants to the præcipe, in order for a fine and common recovery, and in Easter term 10 W. 3. a fine was levied and common recovery suffered accordingly, and by that deed the uses are declared to *Richard Erissey* in fee.

After this recovery *Richard Erissey* alienated in fee several parcels of the estate, and by his will 20 Dec. 1722. devised the residue of the estate to the defendant *Mary Erissey* in fee.

Jam. Erissey who made the settlement had two brothers *Richard* and *William*, *James* died without issue, *Richard* had no issue male, but left a daughter *Mary* then alive, and *William* had issue *Richard Erissey*, upon whom the settlement was made. And now the plaintiffs *Frances* and *Mary*, infants, exhibit their bill, and by it pray, that such part of the estate was not sold by *Richard Erissey* their grandfather be settled upon them, according to the intent of the articles; and that the defendant, as executrix and devisee of *Richard Erissey*, shall make them satisfaction out of her personal estate for the value of the estate sold by him in her life-time.

[415]

The defendant pleaded the marriage settlement, the fine and common recovery, the deed which lead the uses of them, and the will of *Richard Erissey*, in bar of the relief prayed by the bills; but the plea was ordered to remain for an answer, with liberty to except to it; and then the cause

3 Aik. 293. cause was heard upon the merits. And it was insisted for the plaintiffs, that the intent of the articles was, that provision should be made for the issues male and female of this marriage; that no provision was made for issues female, only by the limitation in the articles to heirs female of the body of *Richard Erisey*; and therefore when those articles were put in execution, the settlement ought to have been made in such manner that the issues female might have the benefit of the provision intended for them; and then the estate ought not to have been limited to the heirs female of *Richard Erisey*, by which it was in his power to bar his daughters by fine and recovery, but should have been to all and every the daughters of the body of the said *Richard Erisey* on the body of *Frances* his wife to be begotten, and then it would not have been in the power of *Richard Erisey* to bar *Mary* his daughter, to whom the plaintiffs are heirs.

[416] That the settlement was intended in pursuance and performance of the articles, and then, when the intent is not well pursued, it ought to be rectified in equity, and the plaintiffs, who are intitled by the proper limitation, may enforce the execution of the articles; and it is the constant experience in courts of equity, that if the settlement in pursuance of marriage articles is contrary or defective, it shall be reformed by the court.

1 P. Will. 622. *Trevor and Trevor* in chancery, 5 June 1719, and afterwards affirmed in the house of peers Feb. 1719, is a case expressly to this purpose; for there by articles in 1669, made by Sir *John Trevor*, late master of the rolls, upon his marriage it was covenanted to make settlement of lands to the value of 250l. per ann. within two years, to the use of himself for his life, without impeachment of waste, and after to the use of his wife for her life, and then to the use of his first, second and other sons by such wife in tail, &c. And in case no settlement was made in two years after the marriage, the persons seised should stand seised to the same uses; after the two years he suffered a recovery, and disposed of the estate by will; but all was set aside, and the construction made was, that the articles should have been executed so as not to have enabled the master of the rolls to defeat the children of the marriage; and although it was insisted, that by the covenant to stand seised the estate was now executed to the limitations as expressed in the articles; it was held, that ought to make no alteration.

De Term. S. Mich. 13 Geo. 1.

But *Pengelly* chief baron, *Hale*, *Carter* and *Comyns*, barons, held that it was dangerous to set aside settlements made upon great deliberation; for though according to the case of *Trevor* and *Trevor*, if articles are made to settle an estate to a man and the heirs male of his body, a settlement in pursuance of such articles will be decreed in equity to be made in common form, to him for life, and to trustees to preserve the contingent uses, and then to the first and other sons successively in tail; yet the rule does not hold with respect to females, who are less regarded, because the name of the family will not probably be preserved by them; and by these articles the daughters of this marriage are postponed to the sons of a subsequent marriage; so the bill was dismissed without costs.

But on an appeal to the house of Lords the decree of dismissal was reversed in Feb. 1727, principally because the settlement, being expressly mentioned to be made in pursuance and performance of the articles, shewed, that the parties did not intend to vary the agreement; and the Lords held, that the expression of heirs female in marriage articles should have the same construction in favour of daughters, as heirs male should in favour of sons, especially as no other provision was made by the settlement for daughters. And the Lords decreed a conveyance to trustees, to the use of the appellants and the heirs females of their bodies, as tenants in common, with cross remainders to them in tail female; and the appellants were to have an account of profits, and of the purchase money for the premises sold, and interest; the principal money to be laid out in land to the same uses, but the interest to be paid to the use of the appellants; all writings to be brought into the court of Exchequer, and possession delivered to the appellants.

[417]

1 Equ. Cas.
ab. 392 pl.
2. 393. pl.
5. 1 Bro. P.
C. 470. cas.
Temp. Tal.
176. 20.
1 P. Wms.
123. 1 Vef.
238. Gilb.
Equ. rep.
113. 3 Atk.
371. 2 P.
Wms. 535.

Case 197

Piper and Thompson. In Seacc'.

Amend-
ment when
allowed.

Vide: Salk.

47.

Vide Stat.

32 Hen. 8.

c. 30. 18 El.

c. 14.

16 & 17

Car. 2. c.

8. 22 & 23.

Car. 2. c. 4.

4 Ann. c.

16.

SCIRE FACIAS upon a recognizance by bail after judgment against principal, recited the judgment in manner following, viz. Whereas *Thomas Piper* lately, that is to say in Michaelmas term last past, recovered against — as well a certain debt upon bond, as also a sum of — shillings for his costs, &c. *in hac parte*, &c. And upon this there was a demurrer, and shewn for cause for that the defendant in the judgment ought not to be condemned for costs *in hac parte*, but it should have been *in ea parte*, &c.

And now it was moved that it might be amended, being only the misprision of the clerk, which was amendable by statute of jeofails in writ original or judicial, and *scire facias* was a judicial writ, and therefore 1 Roll. Abr. 759. S. 2. where bail sued an *audit' querel'* and *scire facias* upon it, which recited the *audit' querel'* the capias against the principal in the time of Queen Elizabeth, and the return upon it, but recited the capias to be by writ of our lady the Queen of England to our sheriff greeting directed, which imports the writ to be directed to the King's sheriff, and was held to be error in common law, but then amendable; so writ of enquiry is amendable being a judicial writ. Cro. Eliz. 761. 2 Cro. 372. And though Salk. 52. in the case of *Buckskin* and *Hoskins*, where *scire facias* upon writ of error in the King's Bench upon judgment in the Common Pleas *ad assignand' error' quare execution' non*, &c. in ejectment of two messuages, &c. where judgment was in ejectment, of one messuage, &c. it was held it was not amendable, for the writ was good although improper in this case, and plea of no such record, is true; the court by amendment ought not to make the plea false; so *Vavafer* and *Baile* in the same book and folio, where in *scire*

[419]

Variance
between
scire facias
and judgment
not amendable.

3 Co. 161.

Bro. amen.

112.

De Term. S. Hill. 13 Geo. 1.

scire facias upon judgment the name of the plaintiff omitted by the defendant was not amended, for there might be such judgment, but the reason of these cases shewed that in other circumstances a *scire facias* might be amended. *Sed non allocatur*; for it seems to me, all that by statute 8 H. 6. 12 and 15. the judges are impowered to amend in writ original and judicial, is, what seems to them the misprision of the clerk in affirmance of judgments, it is not amendable; so a writ of error could not be amended till the statute 5 Geo. 13. as appears 5 Mod. R. 16, 69, &c. and what is not a misprision of the clerk is not now amendable; and I know of nothing that was taken as a misprision of the clerk only words of form, which ought to be added of course without information of party, which is the description of the matter of form given by Lord Coke, 5 Co. 35. b. where words which are not pursuant to that which ought to be the direction or instruction of the clerk, and therefore in writ of enquiry, misprision, which is not pursuant to the award of the writ of inquiry, which the clerk ought to pursue, as appears in the cases cited, Cro. Eliz. 761. 2 Cro. 372. so 3 Mod. 112. where *per Sacrum probor & legalu' hom'* were omitted in a writ of enquiry, but if the roll does not warrant an amendment no misprision shall be amended; as if the roll awarded a writ returnable on Friday prox' post crast' ascension' writ of inquiry of such return, although after term, was refused by the Court to be amended. 1 Show. 61.

So in the case 1 Rol. Abr. 797. the *capias* upon the roll being *tempore Eliz.* and directed to our sheriff greeting, was directed to the Queen's sheriff, therefore a recital of the *capias* in *scire facias* upon *audita querela tempore Jacobi* might be amended by the roll, for the *capias* recited was not by writ of Queen Eliz. to our sheriff, viz. directed to the King's sheriff, but to the Queen's sheriff, and this appears in the same book. 1 Rol. Abr. 797. S. 1. If there be an *habeas Corpora* to summon a jury summoned in court late the queen's, and *distringas* was for the jury summoned in our court, judgment was reversed thereby 3 Jac. so S. 3. in dower, for third part of one messuage, one stable, one granary, &c. *Petit Cape*, omitting one stable, it was not amendable; an original writ, if it varies from the instructions, may nevertheless be amended, but not otherwise; and therefore it was answered by the court that the writ was not amendable. But afterwards

Dinv. 333.
pl. 25.
Holt 59.
Palm. 123,
124.
Cro. Car.
147, 148.
5 Co. 36. a.
1 Leon. 300.
1 Jones 199.
Hut. 57, 79.
5 Co. 31, b.
Cro. Jac.
238, 411,
545, 546,
549, 685.
8 Co. 159,
a.
Cro. Eliz.
350, 711,
712.
1 Roll. 603,
927.
Cro. Eliz.
468, 677,
767, 820.,
Moor 696,
711.
And. 77,
362.
B. R. H.
314.
Cro. Car.
38.
Litt. !Rep.
54.
Cro. Jac.
64.
3 Bac. abr.
273.
2 Ld. Ray.
1059.
1 Salk. 52.
Ante 60,
250, 376.
386, 418.
Post. 566,
580.
S. e. 1 Bur.
322.
Moor 566.
1 Bull. 22,
23.
Cro. Car.
225, 226.
Palm. 116,
117.
Noy 137.
2 Roll. rep.
131, 132,
133.

De Term. S. Hill. 13 Geo. 1.

Stile 61, 80; 81. It was agreed by the Court that there needed no amendment in this case, for though *in ea parte* seemed properer by way of recital, yet when it is said *in hac parte*, that sufficeth, for it had relation to the judgment mentioned in this same writ, and therefore it might well be said that the plaintiff recovered his debt by judgment, and also his costs appointed in the judgment here mentioned, and there are precedents both ways.
 Poph. 121.
 1 Brownl. 156.
 2 Brownl. 202, 203, 204, 205.
 1 Mod. rep. 185.
 Allein 34, 42, 43.
 Lit. Rep. 342. 1 Keb. 189, 493. 1 Sidf. 266, 342, 379. 2 Jones 159, 170. Hob. 281.
 1 Vent. 271, 272.

Case 198

Barnes and Otway. In Scacc.'

Within what time error in parliament may be brought.

[421]

ERROR of judgment in the Exchequer Chamber, returnable the first day of parliament, viz. the present sessions; and now it was moved that plaintiff in error might transcribe the record within eight days, otherwise that execution might be taken upon the judgment, and a rule was made to shew cause upon this matter; but now the rule was discharged, for by order of the Lords in Parliament 13 July 1678, all persons upon writs of error in Parliament shall bring in their writs in 14 days after the first day of the session in which such writs shall be returnable, otherwise such writs shall not be received unless it be upon judgments given during the session, which shall be brought within 14 days after judgment given; and therefore such motion within 14 days after the beginning of the session is too hasty, for it is not reasonable that a plaintiff in an original cause should take execution within the time allowed by order of the Lords to bring such writ into their house; but if the plaintiff in error should exceed the time allowed by the Lords, in such case, it would then seem reasonable that the plaintiff should be at liberty to take execution upon the first judgment; and thus it was said to be formerly determined in this Court in the cause between *White and Roberts*.

o
-
t
n
e
s
e

1.

e-
nt
or
fe
a
w
ar-
in
he
n-
be
be
re-
he
riff
the
nto
the
nen
ake
l to
een

o E

A
me
ple
An
of
thi
the
24
to
rev
an
Ch
co

vol
of
ed

N
was

D E

Termino Pasch.

[422]

2 Geo. 2. In Scacc.'

The King and Huggins.

Case 199

ACTION for escape for the debt of the King against defendant late warden of the Fleet. Mr. *Ward* moved, that the defendant might be allowed liberty of pleading *non debet*, & *recent' insecutus est*, for by statute 4 Ann 16. it shall be lawful for any defendant, &c. with leave of the Court, to plead as many several matters as he shall think necessary for his defence; and this statute extends to the King's suit as well as to that of the subject; for Sect. 24. it is said, this act and all statutes of jeofails shall extend to all suits for recovery of debt immediately owing, or any revenue belonging to her Majesty, her heirs or successors, and to all courts of record in county palatine of *Lancaster*, *Chester*, *Durham*, and principality of *Wales*, and all other courts of record in this kingdom.

In an action for an escape, defendant allowed to plead double.

And so it was agreed in this Court.

And afterwards, upon affidavit that the escape was not voluntary, (for otherwise by statute 8 & 9 W. 3. 26. plea of fresh pursuit is not allowable) the defendant was allowed to plead both pleas.

Note, This case is misreported: The defendant did not plead Non Debet, but a recaption by fresh pursuit. Park. Rep. 115.

D E

Term. Sanct. Hill.

6 Geo. 2.

Case 200. Attorney General *and* Young and Others. In
Scacc.'

Whatever
a trustee
does to pre-
vent the in-
tention of
his testator,
is a breach
of trust and
ought to be
set aside.

INFORMATION by the Attorney General *ex relatione* of
Sir Thomas Hanmer and others, setting forth that John
Sutton by will dated — July 1696, taking notice that he
was seised of the *Chequer-Inn*, in the parish of St. Andrew
Holburn, and that he had a mortgage upon a farm called
Cooper's Farm in the parishes of *Brockley* and *Whepstead* in
the county of *Suffolk*, for 200*l.* by indenture of
1665, of which he afterwards purchased the inheritance
in the name of his brother *Thomas Sutton*, and the convey-
ance was executed to *Thomas Sutton* and his heirs, in trust
for himself in fee, appoints that all his estate freehold and
copyhold, his leases, chattels and personal estate be subject
to the payment of his debts, and also charged with the an-
nuities and legacies devised, &c. as after is expressed.

Then he directs his nephew *Thomas Sutton*, son and heir
of his brother *Thomas Sutton*, to convey the said term to his
trustees after named, their heirs and assigns for ever, upon
the several uses, trust and purposes aftermentioned. Which
if he refuse to do, or to declare the trusts thereof by some
deed, &c. in such manner as his trustees in his will named,
should reasonably think fit and require, within 12 months
after his decease, then from such refusal he wills, That all
the legacies, &c. given by the said will to his nephew
Thomas Sutton and the heirs male of his body, shall cease
and be void.

[424]

Then he devises as follows, *I give to my said nephew all
my freehold and copyhold lands in Brockley and Whepstead,
during the term of his natural life; and immediately after the
death of my wife, I also give to him the Chequer-
Inn, &c. during his natural life; and from and after his de-
cease,*

cease, I give the same to the first son or issue male of his body, and to the heirs male of the body of such first son; and for default of such issue, to the second son or issue male of the body of my said nephew, and to the heirs male of such second son for ever.

Then he gives to his sister *Elizabeth Sandford* an annuity of 2*l.* per annum; to his niece *Bridget Cure* 8*l.* per annum, for their respective lives; *Provided that my said nephew Tho. Sutton, or his assigns, and the heirs male of his body, shall not do or suffer any waste, &c.* and shall not defeat or obstruct the payment or performance of any the annuities, legacies or charitable bequests in his said will; then he devises, that after the decease of either of his sisters, the like annuities as to them given shall be paid for relief of six poor men, &c. in *Bury*.

Afterwards follows this clause, *And immediately after the death of my wife, and the death of my said nephew Tho. Sutton without issue male of his body, or after the death of such issue male, I devise to my said trustees, and their heirs, the said Chequer-Inn, and farm in the county of Suffolk, on trust to pay 30*l.* per annum for ever, for relief of six other poor men, &c.*

Then information shews, that *Tho. Sutton* the nephew dies, that some of the defendants pretending to be his heirs at law, and others to be devisees under his will, refuse to execute any conveyance pursuant to the will of the first testator, and prays that they may do so, and account for the profits, and deliver possession to the trustees, &c.

To this information defendants plead, that the nephew *Tho. Sutton*, being tenant in tail by virtue of the said devise to him in his uncle's will, did in Mich. term 12 Ann. suffer a recovery of the *Suffolk* estate, and two other recoveries of the *Chequer-Inn*, part lying in *Middlesex*, and part in *London*, and by indenture of lease and release dated 9 & 10 Oct 1712. declared the uses to himself, in fee, and after by will dated 27 April 13 Ann. devised the premises and several sums of money out of them to several of the defendants, and by codicil — 1727. devised several other estates to defendants, and then died without any issue; and this is set up in bar of the relief prayed by the bill.

This plea was allowed by the Court of Exchequer. But after, on appeal to the House of Lords, that decree was reversed.

And now it was insisted, that *Tho. Sutton* the nephew was by this will of his uncle not tenant for life, but tenant in tail, and consequently enabled to suffer the recoveries, and bar the subsequent bequests to the trustees for charitable uses.

It was admitted, that the nephew *Tho. Sutton* did take at first only an estate for life, remainder to his first and second sons successively in tail, but then by the subsequent words, *and immediately from and after the death of my said nephew without issue male, &c.* he had an estate-tail; then a devise to one for life, and after to his issue by a second wife, gives an estate-tail; and so it was resolved in the case of *King and Melling*. 1 Vent. 214, 225.

[426] That the case of *Langley and Baldwin* is a case in point, which was this: A. by will devises lands to *Henry* his eldest son for life, and after his decease to *Jonathan* his grandson for life, without impeachment of waste, and after to the first son of *Jonathan* and the heirs male of his body, and for want of such issue to the second, and so on to the third, fourth, fifth, and sixth son of *Jonathan*, and the heirs male of their respective bodies. And in case *Jonathan* dies without issue male, then he devises to another. This case was by the Lord Chancellor referred to the consideration of the Court of Common Pleas, and by them resolved to be an estate-tail in *Jonathan*.

That the clause *he should not do or suffer waste*, could not vary the case, for so it was in the case of *King and Melling* and *Langley and Baldwin*, and it was fit to restrain it with regard to his first and second sons.

That the cause of *Popham and Branfield*, 1 Salk. 236. would indeed have been contrary, if it had been as there reported; but that report doth not truly state the case, for the limitation did not go only to the tenth son, and rest there, it was limited to every other son and sons, &c.

That the clauses, *if he refuse to convey, &c.* or *did endeavour to defeat or obstruct the performance of the charitable bequests, &c.* were arguments that the testator intended an estate tail to his nephew rather than otherwise; for it is said, that the legacies, &c. devised to his nephew and the heirs male of his body shall cease, &c. and if he and the heirs male of his body shall commit or suffer waste, &c. which shew the testator apprehended what he devised to his nephew would go to him and the heirs male of his body; and from clauses of that kind, though in themselves void and

and of no effect, the intent and meaning of the testator may be collected, as appears in *Sondays's* case, 9 Co. 127. Bridg. 137.
C o. Car.
185.

It can be no objection to this construction, that the trusts of the estate barred by his recovery were for charitable uses; for the single question is, whether *Thomas Sutton* the nephew had an estate-tail in him whereof he might suffer a recovery or not? if he had, all estates depending upon that intail will be equally barred, whether they were given to charity or not.

Nor will there be any difference between the *Chequer-Inn*, of which the testator was seised in fee, and the estate in *Suffolk*, whereof he had only the equitable interest; for the construction of the words of a will must be the same in a court of equity, as in a court of law; and the devise of an equity must be governed by the same rules that the devise of the legal estate is governed by. A recovery of an equitable interest or trust, hath the same consideration in a court of equity as if the person who suffered it had the legal estate in the same manner, and had suffered a common recovery, such recovery would be considered in a Court at law. It would make a strange confusion, if the same words applied to two different inheritances, one a legal, the other an equitable one, should give the same person an estate-tail in one, and only an estate for life in the other. [427]

But it was insisted on the other side, and determined by the Court, that as to the *Chequer-Inn*, whereof the deviser was seised in fee, the question was proper at law, and therefore the Court would not determine, but leave to either that was out of possession a liberty of trying at law his title; that what was urged, and the cases cited, seemed very good law; for if a man devise to A. for life, and after his death to the issue of his body, or as *King* and *Melling's* case, to the issue of his body by a second wife, it would not now be doubted, but that A. hath an estate-tail, although he should be restrained from waste, or have power given to make a jointure. That in like manner the case of *Langly* and *Baldwin* seems good law; for when a man gives land to A. for life, and after his death to his first son and the heirs of his body, and so on to the sixth or tenth son, and then adds, but if he die, without issue male of his body, then I give the land to B. in tail; these latter words will create an estate-tail in A. subsequent to the limitation to his sons particularly expressed; for it is the plain intent

[428] of the testator, that B. should not have the land till a total failure of issue male of A. be they never so many, should first happen; but as all the sons not particularly spoken of must take by way of descent, there being no words of purchase with respect to them, consequently, in order to make good the manifest intention of the devisor, such construction will be made as in case of limitation of uses to the right heirs of him that conveys, where an use results to the grantor, since by a maxim in law he cannot make his right heirs purchasers.

But such construction is not made but where it is made necessary by the plain and evident intention of the testator; and therefore where *Clement Frenchman* devised to his wife for life, then to his cousin *Clement* and the heirs male of his body, & *si contingat* (and if it happen) his cousin *Clement* die without heirs of his body, then to his cousin *Alex. F.* and to the heirs male of his body for ever; *Clement* left issue a daughter, and died without issue male; and it was insisted, that by the subsequent words, if *Clement* die without issue generally, without saying issue male, or such issue, or any words of like nature, the cousin *Clement* must take an estate in tail general, which would go to his daughter. But it was resolved by the whole Court without difficulty, that he should only take an estate in tail male, for the latter words should be governed by the former.

Dyer 171.
Bendi pl.
114.
1 And. 8,
Mo. 13.

The present case may perhaps be a middle case between these two; it is sure the case of *Langley* and *Baldwin* doth not come up to it exactly; for there was a plain intention of the testator, that till a total failure of issue male of *Jonathan* the estate should not go over to others; and it was in nature of a condition precedent to the other's taking; but here it is plain through the whole precedent part of the will, that *John Sutton* should take but for life; he takes care he should not do or suffer waste, that he should not refuse to convey according to the trust, &c. that he should keep the premises devised in repair, and should not impeach, question or endeavour to defeat, avoid, destroy, invalidate or obstruct the payment or performance of all or any of the annuities, legacies or charitable bequests in his will; therefore it may seem unreasonable to think the testator meant in the very next words to give him such an estate as might enable him to defeat or destroy, or to put such a construction upon them, unless there be an absolute necessity.

cessity for it. But where is that necessity? The words are not penned in the nature of a previous condition, as in the case of *Langly* and *Baldwin*, but rather are designed to denote the time when the charitable bequests should take effect, *from and immediately after the death of my nephew Tho. Sutton without issue male of his body, or after the death of such issue male, I devise to my said trustees, &c.* And as there appears no intent of the testator to give his nephew any other estate than before, so the words may be satisfied with a different construction; for the words *from and immediately after* seem relative to the devises before, immediately after the estates already given, *I devise to my trustees*, and then after the death of the nephew without such issue male, as before mentioned; or it may mean no more than this, if at the death of my nephew he have no issue male living, or if he have, when they die the estate shall immediately go to his trustees; and in case such construction be not made, the words *or after the death of such issue male* must be rejected, and are intirely useles.

[429]

What is said, that the words recited in the restraining clauses, which were designed to prevent his defeating his charities, *then the bequests to him and the heirs male of his body shall be void, if he and the heirs male of his body do waste, &c.* import the estate-tail was intended to the nephew by the testator, do not necessarily conclude so far, since they may be satisfied by the bequests given before to him and his sons; and it would make wills very uncertain, if every uncautious and incorrect expression *in transitu* should be laid hold on, to determine the testator's meaning, to be different from what seems to be so upon the consideration of the whole will. It is true, every such expression may be made use of to illustrate the testator's intention, and that was all done in *Sunday's* case, 9 Co. 127. Ante 426. where, upon the whole complexion of the will, the testator's will was held to be, that all the children should have the like estate, and not some to take in tail, and others only for life.

These things were mentioned, not to deliver the opinion of the court upon this point one way or other, but to shew that it might deserve consideration, and being a question at law was fit to be left to a trial, and not determined in equity, especially since it appeared there had been some doubt in the case; for when the Exchequer allowed the plea, they must conclude that *Tho. Sutton* the nephew took an estate-

[430]

De Term. S. Hill. 6 Geo. 2.

estate tail by the will ; and when the House of Lords reversed their decree, it argued at least, that they thought it doubtful, and to deserve further consideration.

As to the farm and estate in the county of *Suffolk*, where of the devisor had only an equitable interest, and the legal estate was in *Tho. Sutton* the nephew, that stood upon a different foot, and was proper for a court of equity to determine.

The Court clearly agreed, that there was no difference in the construction of the words of the will in a court of equity from what they would have in a court of law ; and therefore if a devise of lands was made by him who had only an equitable interest, or was but *cestui que trust*, the devisee would take the same estate in all respects as he would have done from the same words if the devisor had been seised in fee of the legal estate ; nor will any difference arise in the construction of the words of the will from the remainders being limited or disposed for charitable uses, than what would arise if the same remainders had been disposed to private persons.

[431] But in this case the bill is, that the heir and devisees of *Tho. Sutton* the nephew may be decreed to convey pursuant to the directions of the will. He in the first place charges and subjects all his estate to the payment of his debts, and to the annuities and legacies given by his will ; then, taking notice that the legal estate of this farm in *Suffolk* was in his nephew *Tho. Sutton*, he directs him to convey the same to the trustees afternamed and their heirs, upon the several uses, trusts and purposes after limited and appointed, or else to declare the trust thereof by deed, &c. in such manner as the said trustees shall reasonably think fit and require, in 12 months after his decease. Now in case the bill or information had been exhibited within the twelve months to enforce such conveyance or declaration of trust, would not the Court have enforced a strict execution of the conveyance, such as might not have left it in the power of the trustee presently to defeat it ? It is apparently the intent of the testator, that the lands in *Suffolk* should go to his nephew for life only ; that after failure of his children and their issues, it should go to the charities specified in the will ; that the nephew should not defeat them ; that on his refusal to declare the trusts, he should lose all the benefit given him by the will ; would the Court then have enabled him immediately to have defeated them ? No surely, they would

would have put it out of his power to do so. The subsequent uses, trusts and bequests in the will are only specifications of the special uses and trusts the testator desired to have perpetuated and take effect; and therefore the conveyance or declaration of the trust must have been directed in such manner as that they might take effect; it was to be done in such manner as the trustees should reasonably think fit and require; would it have been reasonable to require such a conveyance as might immediately have been defeated, and the trustees barred of the estate and interest intended them? The conveyance in this case must have been directed agreeably to what would have been done in the case of marriage articles. And the utmost that could have been asked from the words, *after the death of my nephew Tho. Sutton, without issue male of his body begotten, or after the death of such issue male*, would have been, that an estate should be limited to any other sons the testator should have, in the same manner as it was given by the will to his first and second son, not that it should be limited to him and the heirs male of his body, so as to defeat all subsequent limitations.

That this is now the constant method of courts of equity in the execution of conveyances upon marriage articles or other agreements; the case of *Trevor* and *Trevor* was solemnly debated and considered, and afterwards affirmed in the House of Lords. There the master of the rolls, Sir *John Trevor*, had agreed by marriage articles to settle an estate on himself for life, then to his wife for life, then to the issue male of his body by such wife; and in case no settlement was made in two years after the marriage, the persons seised should stand seised to the same uses; after the two years he suffered a recovery, and disposed of the estate by will; but all was set aside, and the construction made was, that the articles should have been executed so as not to have enabled the master of the rolls to defeat the children of the marriage. And although it was insisted, that by the covenant to stand seised the estate was now executed to the limitations as expressed in the articles, it was held that ought to make an alteration.

[432]

So in the case of *Papillon* and *Bois* determined by the master of the rolls, and after agreed to by the Lord Chancellor, it was directed, that where a person devised monies to be laid out in the purchase of lands, to be settled upon A. for life, and after to the heirs male of the body of A.

it

it was held, that such settlement should be made as might effectually secure the estate for the benefit of the several issues of A. But by many cases of like nature in Courts of equity, it seems to be just, that where conveyances are to be carried into execution pursuant to the direction of articles or a last will, the same should be executed in such manner as may secure to every one the estate or benefit intended him, if it may be done consistent with the rules of law, and not executed in such a way as will enable one person to defeat the estate of another, if it can be properly prevented. And such execution as would have been decreed against the nephew if living, or if the information had been exhibited in twelve months after the testator's decease, the same ought to be executed by his representatives now; and whatever the trustee hath done to prevent it, is contrary to the duty of a trustee. And therefore the Court declared, that the common recovery suffered by *Tho. Sutton* the nephew, of the estate in the county of *Suffolk*, and the deed leading the uses of it, were a breach of trust, and ought to be set aside; and that the heir and the devisees should join in executing a conveyance to the trustees named in the will, or such others as should be appointed trustees according to the direction of the will, upon the uses and trusts not yet determined which were mentioned in the will; that they should likewise deliver possession, and account for the profits they had respectively received since the relators were intitled, and that the bill should be retained for a year, and either side at liberty to try the title at law, for that part which was not the trust-estate, and then resort to the Court for further directions, and that the plaintiffs should have their costs,

[433]

Case 201 Attorney General and Elizabeth White, executrix of James White. In Scacc.'

If the king's
debtor dies,
he may
pursue his
remedy
against his
executor at
any time.
For debts
due to the
King, see
2 Inst. 198.

INFORMATION of debt was exhibited Trin. 29 June 12 Geo. 2. against the defendant for 1140l. for the duties of 2600 gallons of brandy imported by her testator 10 Feb. preceding. On *nil debet* pleaded, the jury find the testator imported these brandies in the years 1719 and 1720, in casks containing but 12 gallons each, and that he before the duties paid, which came to 1140l. died 20 Feb. 1725, having made his will and his wife, the defendant, executrix.

On

De Term. S. Hill. 6 Geo. 2.

On this verdict it was insisted on behalf of the defendant, ^{1 Inst. 130.} that since by statute 4 & 5 M. 5. S. 8. the importation of ^{25 Ed. 3.} brandy in small vessels and casks not containing each 60 ^{St. 5. c. 19.} gallons at least was prohibited on pain of forfeiting the said ^{2 Eliz. ca.} brandy or value thereof, &c. the King ought in this case ^{37.} to have sued for the forfeiture, and not by way of debt for ^{2 Roll. abr.} the duties or customs, which would have been payable in ^{157.} case the brandy had been fairly imported. ^{Dyer 255.}

At least the duty in this case arising *ex dilecto* from the unlawful importing of the brandy in small casks, however the King might have dispensed with the forfeiture, and demanded the duty against the testator, he cannot do so to charge the executrix, against whom in this case debt is not maintainable.

And it was argued by Mr. WARD and Mr. BOOTLE counsel for the defendant, that where goods were absolutely prohibited to be imported, the importation occasioned a forfeiture of the goods, which the King could not dispense with; that there was a wide difference between goods on which a duty was laid, and a forfeiture given as a penalty for non-payment of the duty, and goods that were prohibited to be imported, and forfeited in case they were so. In the first case it was not much controverted but that the King might waive the penalty and accept of the duty, and if they were carried into the Custom-house, the duties might there be accepted, but if prohibited goods were carried to the Custom-house, the forfeiture still continued.

[434]

When goods are prohibited the intent of the law is, That no duty should be paid for them because they are not to be imported at all; but if upon the importation a duty may be accepted instead of the forfeiture, the importation would be encouraged, and the intent of the law-makers defeated.

But in case the King could dispense with the forfeiture and take the duty, he ought to make his election to do so in the life of the party, otherwise it would be highly inconvenient; for as the King's debt must first be satisfied, it may happen after a merchant has been dead 20 or 30 years, and his executor had administered, paid all his debts, and disposed of all his assets, a claim might be set up for duties upon goods imported which the executor has no knowledge of, and can make no defence against, and every thing turned round, or the executor ruined on pretence of a *devastavit*.

The

De Term. S. Hill 6 Geo. 2.

The proceeding by way of information for debt in the case of the Crown was introduced by Sir EDWARD NOR-
THEY, when Attorney General; for before the informa-
tions used to be founded upon the statute; but if such pro-
ceedings be likewise carried on in the case of the executors
it must be much more mischievous, especially in cases of
this nature, where the matter charged is a personal tort
done by the importer, whose offence dies with his person;
and therefore in all cases of penalty, forfeiture by wrong
committed or done by any, no action lies for it against his
executor. Action lies not against executors on stat. 1 & 2
Edw. 6. 13. for not setting out tithes.

[435]

Cro. El.
241, 860.
Moor 89.
Kitch. 43,
2.
9 Rep. 87.
B o. Exec.
79. lay.
Gager 55.
1 Roll.
924.

So if the tenant be amerced in the manor court, and die
before it be levied, the amercement is lost. 8 Co. 41. 2.
Andr. 47. 3 Com. Dig. 174, 175.

Debt lies not against executors where the testator might
wage his law.

Nor upon an award made upon a submission by the tes-
tator to a reference, although the award be in writing

And no instance or precedent can be shewn, where such
an information was maintainable against an executor.

ATTORNEY and SOLICITOR GENERAL *e contra* insist-
ed, that the statute 12 Car. 2. ca. 12. grants to the King
the duties of tunnage and poundage, viz. so much *per ton*
on all wines imported, &c. so that it is a duty for which the
King may have debt, and the subsequent acts which aug-
ment the duty are worded in the same manner. Stat. 4 &
5 W. & M. 5. for further supply, &c. gives and grants to
the King, the additional rates, impositions, duties, viz. for
every gallon of brandy imported, &c. two shillings. Now
wherever the common law or custom creates a duty, debt
lies for it; per Hale, Hard. 486. And it must be the same
where an act of parliament creates the duty, when a statute
enacts any thing for the advantage of another, the person
will have a remedy given him by the same statute; per
HOLT C. J. Mod. Ca. 26. Thus on stat. 28 Eliz. 4. the
sheriff may have debt for his fees. Mod 853. 1 Salk.
209. and on statute 2 & 3 Edw. 6. 14. for not setting out
tithes; on stat. 14 H. 8. 5. for the practice of physick in
London without licence, though no such action is expressly
given.

Salk. 331.
333.
Lat. 17,
51.
Poph. 173.

But it was chiefly objected, that by the proviso in stat.
4 & 5 W. & M. 5. S. 8. if brandy be imported in casks
under 60 gallons each, it is forfeited, and then the action

is not to be maintained for the duty. To which it was answered by Mr. Attorney, that this prohibitory clause does not extinguish the duty, but the King may take advantage of either as he pleases. It will not be said, because by [436] stat. 1 Anne 14. it is enacted, if any import or land goods, &c. before duty paid or secured, or be aiding, &c. he shall forfeit the goods and double the value, that therefore the King can have no remedy for the duties. And what difference, when such forfeiture is given in the same or some other act? And as to what was said that the King should make his election in the life of the party, no case is cited to warrant it; in debt or assumpsit the executor may elect either, as well as the testator.

HALE cited 2 Mod. 128. which saith, if in an act of parliament there be a prohibitory clause, and another which gives a penalty, an information lies on the prohibitory clause, and the party may decline to proceed for the penalty. 1 Rol. Rep. 383. Debt was brought by the farmers of the customs on stat. 1 Jac. cap. 33. for the duty of poundage for goods landed without paying the customs; so upon this very statute 4 & 5 W. & M. 5. it hath been held in this Court that debt lies for the duties.

Chamberlain and Hobbs.

And again *Doe qui tam ver. Cooper*, 2 Geo.

As to the second point, on which the most stress seems to be laid, it must be admitted that in all cases where money becomes due by contract or agreement with the testator, an action is maintainable on such contract against the executor, unless where the testator could wage his law; so where the money grows due upon a default or misdemeanour, if reduced to a certainty by a matter of record, &c. as for issues forfeited by the testator, or fine on him by justices at *Westminster*, assizes quarter sessions, commissioners of sewers, bankrupts or stewards of leets, &c. *Offic. Ex.* 161. Carth. 218.
27 Hen. 8.
23. a.
3 Roll. 930.
Hob. 188.
Ante 435.
9 Co. 89.
Plowd.
Com. 183,
a.
Bro. act.
sur. l. case
106.

It is true no action lies against an executor or administrator for any personal wrong or injury to the person, lands, or goods of another, as trespass, battery, false imprisonment, waste, &c. Co. Lit.
209.

Nor upon a statute which gives remedy by debt against the testator himself for his misdemeanour, as debt for an escape, for not setting out tithes, &c. 41 Ass. 15. *Dyer* 322. 2 Inst. 382, 650. *Off. Ex.* 183. [437]

But

De Term. S. Hill. 6 Geo. 2.

But the law gives further remedy against executors in the case of the crown than in the case of a common person; for as by the common law the King had remedy for any thing due to him against the person, land and goods of his debtor, 2 Inst. 19. Godb. 290, &c. so if his debtor died, he might pursue remedy against his heir or executor. 2 Rol. Abr. 156, 162. And he might oblige the executor to give security for the king's debt before he administered. 2 Roll. 158. S. 2. 45. So the King might have remedy against the executor for debt on simple contract, for the executor could not wage his law against the crown. Co. Lit. 295. 9 Co. 88. Plowd. Com. 183. a. Bro. Añ. Sur le Case, 106.

So by the King, account lay against the executor of his accountant, though not in the case of a common person for want of privity, till the statute 4 & 5 Annæ 16. R. 11 Co. 90. 2 Roll. 161.

So where the testator was chargeable only to the King as an intruder, trespassor for waste, or other matter that is of profit or value, although not for a mere personal wrong. Sav. 40.

So for the duty of prisage wines, per 3 Inst. 3 Bull. 1. Ad. 26. 1 Roll. 135.

1 Roll. abr. 927. And as to the inconvenience to executors or administrators, in case an information be brought against them after they have paid away all their assets to satisfy other debts, it seems not greater than what in all cases they must submit to, they must take the best care they can, not to pay debts of an inferior, before those of a superior nature. Plowd. 543. Jenk. Cent. 274.

[438] It is true the King must be first satisfied debts on record, as judgments, statutes, recognizances, and it would be a *disparitas* in the executor to pay other debts before him; so obligations to the King, for they are of the nature of a statute staple, by statute 33 H. 8. 30. 1 And. 129. So debts for fines or amercements in the King's Courts of Record. Off. Ex. 194.

Park. 260. But debts due to the King which are not of record seem not necessary to be satisfied before debts due to other persons, where there is no notice given of the King's debt; as where money is due to the King for wood, tin, estrays, &c. or for amercements in court-
baron

De Term. S. Hill. 6 Geo. 2.

baron or other Court not of record. Off. Ex. 191. 2 Roll. 159. pl. 8. So debt for arrears of rent from the King's lessee. Off. Ex. 193. Or due to a person attaint or outlawed, if not found by office. Off. Ex. 192. So if in debt on a bond the defendant be outlawed before judgment till actual seifure, this debt need not be first paid. 1 Salk. 8. Or if debt be assigned to the King. Lane 65.

And by the opinion of three Barons, judgment was given for the King.

THOMPSON contra.

D E

Term. Sanct. Mich.

7 Geo. 2. In Scacc'.

Case 202

Lord Viscount Falkland *and* Phipps.

Peers of
Scotland af-
ter the uni-
on shal be
intitled to
an action of
Scandalum
Magnatum.

A woman
noble by
birth is not
intitled to
this action.
Crompt. Ju-
ris 34.

ACTION of *Scandalum magnatum* brought by *Lucius Charles* Lord Viscount *Falkland* against *Nathaniel Phipps*, butcher, as one of the peers of *Great Britain*, for these words, *Go fetch your Lord out, G—d D—n him, I will kill him, he is a villain and a villainous rogue*, and for other words, *He is a scrub and scoundrel*, to the damage of 5000l. Defendant pleads Not guilty. Verdict for plaintiff. damage 50l.

But it was insisted on the trial, and reserved for consideration, that the plaintiff ought to prove himself a peer. *Sed non allocatur*; for the plaintiff in his declaration gives himself that denomination, Lord Viscount *Falkland*, one of the peers of *Great Britain*, and if he was not so, the defendant should have pleaded the misnomer, but by the plea in bar he admits the plaintiff to be what he calls himself.

2. That the plaintiff being only a peer of *Scotland* was not intitled to an action of *scandalum magnatum* on the statute 2 R. 2. 5. unless he had been a peer of parliament, for the proceedings of actions of this nature are *Vocem & locum in parlamento habent*. *Fid. Ent. 93, 74.*

Sed non allocatur; for by the statute of union 5 Annæ 8. Art. 23. All peers of *Scotland* after the union shall be peers of *Great Britain*, and have rank and precedency, &c. be tried, &c. and enjoy all privileges of peers as fully as the peers of *England* now do, or hereafter may enjoy, except the right and privilege of sitting in the house of Lords and the privileges depending thereon, and particularly the right of sitting upon the trial of peers.

Cum. 439.

Now the statute 2 R. 2. 5. or 12 R. 2. 11. does not confine the remedy thereby given for speaking false news,
lies

De Term. S. Mich. 7 Geo. 2.

lies or other false things, to words spoken only against the peers of parliament, but extends to false words against other nobles or great men of the realm, and therefore when the peers of *Scotland* are by act of parliament made peers of *England* or *Great Britain*, they are nobles of the realm. There was no viscount at the time of the statute 2 R. 2. the first viscount being *John Beaumont* who was created viscount 18 H. 6. yet when created noble, though by a new title, he was intitled to his action on this statute.

Cro. Car.
136. Pal.
565.

And though some precedents may add, *Vocem & locum in parlamento haben*, this is not necessary for the maintenance of the action, and the several precedents omit them, as Hern. pl. 200, 201. 2 Bro. 16. Brownl. R. 21. So Vid. Ent. 61, 72.

For words on which this action has been brought, see Cromp. Juris 35. 3 Leon. 376.

Cro. El. 1. 67. Moor 142, 686. 4 Co. 16. 2 Show. 505. 12. Co. 132. 2 Sid. 21, 233. Freem. 49, 220. 1 Lev. 148, 277. 2 Keb. 537, 813. Mod. 232. 2 Mod. 151, 160. 4 Bro. Abr. 406. 1 Leon. 336.

Case of Kennet Lord Duffus. In the House of Lords. Case 203

BY stat. 1 Geo. 42. it was enacted, That whereas *George Earl of Marischall, Kennet Lord Duffus*, and several others to the number of 50. did on or before 13 Nov. 1715 in a traitorous manner levy war, &c. and are fled to avoid prosecution, &c. if they render not themselves to one of his majesty's justices of the peace on or before the last day of June 1716, every of them not rendering himself as aforesaid, shall from the said 13th day of Nov. 1715 stand and be adjudged attained of high treason, &c.

When the legislature puts terms upon an offender, no inferior court can hold any other terms to be an equivalent.

15 May 1716, Lord *Duffus* wrote to Sir *Cyril Wyche*, desiring to throw himself at his majesty's feet, and to make a visit to him for that purpose; and did so at *Hamburgh*, where Sir *Cyril* was then resident as a public minister for the king.

[441]

2 June 1716, he set out for *England* by ship from — and came to *Hamburgh*, where on the 29th day of June he was seised and taken into custody about — o'clock in the evening, and was after sent into *England*, and committed to the *Tower*, but pardoned by king *George*.

Upon this case Lord *Duffus* petitioned the king, who referred it to the house of Lords, that his peerage might be allowed. And it was insisted by his counsel at the bar of the house of Lords, that *Kennet Lord Duffus* his father was not attained by this act of parliament, since he was minded to render himself, and coming into *England* for that purpose, but was prevented by the king's minister abroad, who seised

seised and detained him at *Hamburgh*, from whence he was ready to set sail for *England* in order to render himself there to a justice of peace according to the direction of the act of parliament.

That he had an intention to render himself according to the act, appears by his application to the king's minister for that purpose the 15th of May; and accordingly he set out the 2d of June 1716, in order to come to *England*, and was got as far as *Hamburgh* in his journey, till he was seised by the king's minister there; which was the same as if he had been taken into custody by the king himself, whereby his render was prevented, and made impossible by the act of the crown, of which no advantage ought to be taken.

[442]

And by law it was urged, it is a sufficient performance of a condition if it be performed in substance, although every circumstance is not pursued; and in this case, although he could not render himself to a justice of peace, yet he had rendered himself to one of the king's ministers, and was after sent over, and might have been tried, which was all the design and end of the act of parliament; and consequently the substance of the condition required by the act of parliament being complied with, it was sufficient to prevent the attainder from taking effect. Suppose he had rendered himself to one lately put out of the commission of the peace, of which he had received no notice, would not the act have been sufficiently complied with? And many other cases might be put, where it would be extremely hard the party should not be excused, since it would be equivalent to a literal performance of the condition.

Secondly, It was said, that in all cases where the condition becomes impossible to be performed by the act of God, or of the law, or by the act of the king, or person on whose behalf the condition was made, the condition is dispensed with, and need not be performed: And therefore in this case, when the Lord *Duffus* was taken into custody by the king's minister, which was the act of the king, it was impossible for him to come into *England*, and render himself to a justice of peace.

And it being objected, that his intention to render himself was not very evident, since his application by letter to Sir *Cyril Wyche* at *Hamburgh* was the 15th of May, but he took not ship till the 2d of June, and was no farther than *Hamburgh* on the 29th of June, whence it was from the evening of that day impossible to come into *England* time enough

s
e
of
o
ar
et
nd
ed
ne
py
a

ce
gh
al-
ce,
rs,
ch
and
the
to
nad
of
not
any
ard
va-

ndi-
od,
on
dif-
e in
by
was
nim

nim-
r to
it be
than
the
time
ough

enough to render himself to a justice of peace on the last of June, which was the next day; a witness was produced, who said it was possible to come from *Hamburgh* to *England* in the time, since it was but — leagues, and with a good wind a person might sail — leagues in an hour.

But taking it for granted, that the Lord *Duffus* meant to render himself, and might come from *Hamburgh* to *England* time enough, yet there being a positive act of parliament, which made every person attaint that did not render to a justice of peace by such a day, it must be strictly complied with, and the non performance could not be dispensed with by any inferior judge or court, or by any authority but that which made the act of parliament.

[443]

And this matter of law was referred to the opinion of the judges present, who were the chief justice *EYRE* and myself, and we were of opinion, that this was not a compliance with the act of parliament, nor could any inferior court, if the Lord *Duffus* had been arraigned before them, construe it so to be; for all he could say for himself had been, that he had surrendered himself according to the act; which fact, if it had come to be tried, must have been determined by a jury, who upon evidence could not justly say, that he did render himself to a justice of peace as the act directs; or if they had found the matter specially, the court could not adjudge it to be a render according to the intent of the act; for the legislature may put upon an offender what terms it pleases, nor can an inferior court hold any other terms to be equivalent to them; that must be the act of the legislature itself.

And I mentioned the case *M. 8 H. 4. 12.* which was this: Sir *Thomas Brooks* coming to the parliament 5 H. 4. one *John Savage* fell upon *Richard Chedder* his servant, who was attending him, and having grievously wounded him he fled, upon which *de advisamento procerum ad requisitionem communitat' ordinatum fuit 18 Mart' in dicto parlamento*, that proclamation should be made at the place where the fact was done, and if *John Savage* did not render himself to the justice of the king's bench within a quarter of a year after, he should be convicted of the offence, and pay double damages to the party.

Proclamation was made in Easter Term 5 H. 4. and he not rendering himself within the time, a *capias* was awarded against *Savage* returnable *M. 6 H. 4.* and he not appearing *Chedder* sued for the double damages; and *Savage*

De Term. S. Mich. 7 Geo. 2.

[444] in bar said, that he had rendered himself to the king at *Pomfret* within the time, in the presence of the bishop of *Ely* then Lord Chancellor; and the king committed him to the custody of the Duke of *Lancaster* Lord Steward, whereby he could not render himself to the justice of the king's bench; but the court said, the order of the parliament could not be varied by any inferior court, therefore his surrender of himself to the king, since he did not render himself to the justice, as the proclamation required, was of no avail.

TALBOT Lord Chancellor, and Lord HARDWICK, approved the opinion, and the Lords rejected the petition.

Case 204

Case of John Pitt, Esq In Serjeants Inn.

How far
privilege of
parliament
after dissolution
shall be extended.
See for the
privilege of
Lord and
Commons,
4 Inst. 24.
St 1. 222,
253. Dyer
314. 60. a.
in marg. 1
Mod. 66.
Bo Exg.
3 Moor.
766, 78.
Scobell's
memor 88,
103 Sir
Sam Dew's
Jour. 414.
Finch. 355.
Ny 101.
Staunf. P.C.
38 a Lord
of Ireland
has no pri-
vilege in
England.
Co. Litt.
156. 2 Inst.
48. 3 Inst.
30.

THE case referred to the consideration of the judges assembled at Serjeants-Inn was thus: *John Pitt* was burgess in parliament for the borough of *Camelford*, and 17 May 1734, the parliament was prorogued by the king to the — of June next, and the ensuing day, viz. 18 May, it was dissolved by proclamation.

1. The first question was, if *John Pitt* was intitled to the privilege after the dissolution? And it was agreed by all the judges, that members of parliament have title to the privilege *eundo, morando & redeundo*. Appendix to Reg. 1. A writ for the abbot of *Malton* against those who had arrested him in his return home, recited, that whereas the nobles in going to parliament and staying there, and returning from thence, &c. A citizen of *Exeter* being condemned on several informations in the Exchequer during the sessions of parliament, 17 Ed. 4. an act was made, that he should have as many *Superfedeas's* till he should come home. *Cot. Records* 704. it was said, that the commons claim privilege forty days before and forty days after every session; but the commons never have ascertained the time of their privilege.

Although it was declared by the Chancellor upon consultation of the Lords, that peers have only twenty days before and after each session, and that their privilege commences from the date of the writ of summons. 2 Lev. 72.

So the privilege of a burgess begins but at his election; for

for if he be arrested before, he shall not have privilege. [445]
Mo. 340.

Second question, How long the privilege continued? It was said, that the Lords have determined their privilege to have continuance for twenty days before the beginning, and twenty after the ending of the session; but the commons claim forty days. 2 Lev. 72. as before.

But all the judges seemed to think that the commons ought to have a reasonable time before and after the session, but what time was reasonable never had been by them expressly determined; yet this arrest seemed too hasty, and within the time that ought to be allowed for his return.

The third question was, How advantage shall be taken of the privilege? And it appeared to several, that he ought to plead, or at least to sue a writ of privilege, before the court can take notice that he is intitled to it. But after consideration, it was agreed by ten judges, that although a writ of privilege was more proper before stat. 12 & 13 W. 3. c. 13. § 1. yet after this statute no plea of privilege could be well pleaded, for such plea concludes *si curia cognoscere velit*.

See stat. 3
Ann. c. 18.
11 Geo. 2.
ca. 24. 10
Geo. 3. ca.
50. where-
by liberty is
given to
proceed a-
gainst per-
sons privi-
leged dur-
ing the sit-
ting of par-
liament.

But by this act it was enacted, that if any have cause of action against any of the knights, citizens or burgeses, or other person intitled to privilege of parliament, he may prosecute, &c. by summons and distress infinite, or by original bill and summons; as attachment and distress infinite, &c. provided the act extend not to subject the person of any intitled to privilege of parliament to be arrested during the time of privilege; and therefore no plea can be to the suit, but only to the manner of proceeding; but a plea was never known to process, for irregularity of the process is aided by appearance of the party, and each plea shall go to the writ or action as to a bill or plaint; but the bill here is well.

And therefore being only an irregularity against this act [446] (which is a public act and expressly provides, That no person intitled, &c. be arrested during time of privilege) it seems reasonable that it shall be remedied by the court upon motion, and due proof of the fact by affidavit, as if one arrested the servant of an ambassador contrary to the statute 7 Annæ, or upon a Sunday against the statute 29 Car. or in other cases of privilege, as when a juror or witness, or the plaintiff himself be arrested in going to, or returning from the court, which are all discharged upon motion; and by

Lord

De Term. S. Mich. 7 Geo. 2.

Lord HARWICK Chief Justice, writ of privilege was not here usual, only where privilege was pleaded.

Case 205 Dame Dorothy Blunt and Japhet Crook and Thomas Hawkins. Before the delegates.

Where parties are dissatisfied with what two delegates do in *actis ordinariis*, such as setting allegations, &c. the matter may be brought under the consideration of the condelegates.

ON appeal to delegates the case was, That *John Hawkins* made his will in favour of appellant his niece, and after made another will, as pretended, in favour of *Japhet Crook* and *Thomas Hawkins*, and a libel was exhibited to discover the fraudulent contrivances of *Crook* to obtain the last, and to set it aside and establish the first will. *Crook* made evasive and insufficient answer, to which exceptions were taken, but over-ruled by the judge of prerogative court, and thereon an appeal to the delegates.

The delegates reverse the former decree, and retain the cause, and order *Crook* to answer *de novo*, who puts in another evasive answer, upon which the appellant, before sight of any depositions, gives in further allegations to explain facts *Crook* had not clearly answered, and containing facts discovered pending the suit. In Trinity Term these allegations were rejected by two of the delegates at *Doctors-Commons*, on which the appellant applied that the matter be reheard before all the delegates.

[447]

But it was objected, that no such rehearing was ever allowed; that the delegates are all in equal authority, and their meetings at *Doctors-Commons* makes as much a session as at *Serjeants-Inn*, and the other delegates might have been present if they had pleased. That by the commission the delegates are authorised so that *in actis ordinariis duo, in sententiâ definitiva quinque concurrent*, so that the determination by two in this matter, which is an ordinary act, is final and conclusive.

On the other side it was insisted, and so determined by the delegates, that admitting generally two of the delegates may settle the allegations, upon which the proofs in the cause may be taken, and this may be well, if all the parties acquiesce in what they think proper; but if the parties are dissatisfied with it, it will be hard to bind them down to what two shall determine, which would in its consequences be to make them intire judges of the cause; for if they rejected all the allegations one side thought most material, the other

other delegates could have no other evidence before them, on which they could form a judgment, but such as the two delegates admitted.

It seems fitting therefore, that where the parties are dissatisfied with what the two delegates have done, the matter may be brought under the consideration of the condelegates, which is not to bring an appeal or writ of error on their judgment, as is insinuated, before others that are but co-ordinate in authority with them; but it may be better compared to a court's reviewing or reconsidering the act of one of themselves, or their own act, as where matters of order or regularity are settled by a judge at his chamber, or in court, when but one or two there, it is frequent to draw it into examination again, when the court is full; and this may be more proper, where allegations are admitted, than when rejected improperly.

Term. Sanct. Trin.

8 Geo. 2.

Case 206 *Rushworth and Mason and others, Inhabitants of Coventry.* Before the Delegates.

Where articles in the spiritual court are declared null, parties may object below again originally. See stat. 1 Jac. 1. c. 4.

ON appeal to the delegates, the case appeared to be, that 16 July 1733, *John Rushworth* was elected by the mayor and common council of *Coventry* to be usher of the grammar school at *Coventry*; but it being required by canon 77. made Anno 1603, that none teach school without licence from the bishop of his diocese, 3 Oct. 1733, a caveat was entered with the register of the bishop against his obtaining such licence.

23 Oct. the caveator, he that entered the caveat, was called to know what he had to object against the granting such licence, and the proctors on each side exhibited their proxies in the consistory court of the bishop of *Litchfield and Coventry.* *Hand* for *Rushworth* the appellant, *Fletcher* for *George Mason, Nath. Alsop* and *W. Grove*, three inhabitants of *Coventry*, who prayed time to exhibit articles, and a day is assigned for that purpose.

Oct. 26. Articles exhibited, but no title or head to them, and no prayer annexed.

6 Nov. *Hand* prays articles to be dismissed, and day is given to consider them.

[449] 20 Nov. four of the sixteen articles admitted.

Viz. The third, for soliciting the chastity of a woman.

The 10th, That he was passionate and pulled his mother out of bed.

The 11th, That he beat his wife inhumanly after the sacrament, &c.

The 12th, That being vicar of *Filongly* he beat his servant, &c.

And

De Term. S. Trin. 8 Geo. 2.

And the 13th Article, which was for exacting subscriptions, and abusing his parishioners by ill language, threats, striking, &c. ordered to be reformed.

4th Dec. 19, Additional articles given in, which were admitted 11th Dec.

Upon this *Rusworth* appeals to the court of the arches in *querela nullitatis*, for the four articles admitted, and prays that the 13th which was ordered to be reformed should be rejected.

29th April, 1734, appeal considered and adjourned.

7th May, Dr. *Bettesworth* dean of the arches, rejects the *querela nullitatis*, orders the head or title of the articles to be reformed, and the prayer to be extended, and the 13th to be farther reformed.

From this sentence of the dean of the arches the appeal is now to the delegates.

It was insisted for the appellant by serjeant *Birch*, Doctor *Andrew* and Doctor *Cottrell*,

1. That *Mason*, *Alsop* and *Grove*, being inhabitants of *Coventry* are no proper persons to complain of acts done by the corporate body, for they are concluded by their determination, otherwise a minority may defeat an act of the majority. [450]

2. That it was improper to proceed in this manner, for upon the caveator's being summoned to shew what objection he had against the bishop's giving a licence, they should have proceeded in a summary way not by way of libel and article.

3. That on the appeal the court could not reform the Head of the articles, which is to make a new cause, nor extend the prayer, which is to vary intirely the nature of the proceeding; the proceeding was in a criminal way, it is now altered to a civil cause.

4. That if this could be done, it could not be after sentence for the admission of the articles.

5. That the articles are foreign to the matter complained of, which charge him with misdemeanours in his spiritual function of vicar, when the matter was only whether he should have a licence to teach school.

6. It is not too late to insist on this matter, for we say there was a nullity in the proceeding, which may be objected at any time after an appeal allowed, and after thirty years, &c.

And

De Term. S. Trin. 8 Geo. 2.

And all the articles and proceedings from the beginning were declared to be null, and the parties might object below originally, if they had any thing to object against the party's being licenced to teach school as an usher.

[451]
Case 207 William Limbery and Samuel Mafon and Hen. Hyde. Before the Delegates.

A will sufficient to pass a personal estate will not amount to a good revocation of a former will, whereby the real estate is devised according to the statute of frauds.
Stat. 29.
3. Car. 2. c.

UPON a commission of review after an appeal to the delegates where the sentence below was affirmed, the case appeared to be this; *Samuel Mafon* made his will dated 23. June 1729 marked letter A. whereby he devised his real and personal estate, and made *Mafon* and *Limbery* his executors, and made a duplicate of it marked B. which he left with *Limbery* one of his executors, and left likewise a letter with him, shewing where his personal estate was.

July 1730, Mr. *Mafon* told *Hyde* he had made his will, but not to his mind, but he would make a new one, and his son executor, if he would accept of it.

August 17 0, Mr. *Hyde* telling him he had spoke to his son, who would accept to be executor, he said he would then go about it as soon as he could.

The part of his former will in his own custody marked A. he obliterates in many places and many lines together, and makes interlineations with his own hand, but did not tear off his seal or otherwise cancel it, but soon wrote over the paper C. D. E. with his own hand, which was in the main agreeable to the paper A. so blotted and interlined, but not exactly agreeable, there being some additions and alterations to what he had there interlined, and 25 Sept. 1730 told *Hyde* he had wrote his will with his own hand, and when he had finished it would shew it to him, but never did shew it him dying the 2d of Oct. 1730, and leaving paper C. D. E. in loose sheets without being signed or sealed by him, and had began a paper F. G. which seems as if intended to be a duplicate of C. D. E. and under the paper C. D. E. was wrote by him *in witness whereof I have hereto and a duplicate thereof set my hand and seal*, though no hand or seal was put, nor duplicate wrote.

On this case two points were made.

[452] 1. Whether the paper C. D. E. was a good will, at least as to the personal estate.

2. If

2. If not a will sufficient to pass the personal estate, if it amounted to a good revocation of the first will, so that he died intestate.

And it was insisted, that it was a good will of the personal estate, which needs not the same solemnities that are requisite to a will of the land, it need not be sealed, it needs no witnesses, if the testator write it for his will it is sufficient. In the case of *Worlich and Pollet*, Anno 1711, *Mary Pollet* sent for a person to make her will, gave him instructions to do so, when he had wrote it he read it to her, she approved it, declared it to be her last will, sent for witnesses to see her execute it, *signed and sealed* was written, but she died before any other execution, yet it was held a good will, for though the first sentence for it was reversed upon an appeal, yet it was afterwards affirmed before the delegates.

So in the case of *Wright and Walthoe*, three testamentary schedules, whereof one was without date, the second was wrote in witness, but no witness, the third concluded abruptly, yet being wrote by *Richard Helman*, they were declared to be his will, March 1710.

So in the case of *Loveday and Claridge* 1730, *Loveday* intending to make his will, pulled a paper out of his pocket, wrote down some things with ink, some with a pencil, and though it had no conclusion, but appeared to be a draught he intended after to finish, for it was not signed, but had at the end a calculation of his effects, an account of his tea-table, and an order to pay to Sir — *Hankey* a dividend of stocks, yet it was held a will.

So in a case, where the testator gave instructions to make his will of his real and personal estate, and when it was brought to him he made several alterations, and then wrote the whole over as altered with his own hand; this found in his study, though not signed or sealed, was held a good will. It is true, the first sentence was, that he died intestate; but that was reversed by the delegates 18 July 1704. [453]

And in Sid. 304. a will was held good, although in loose sheets.

So in the case of *Brown and Heath and Pocklington*, 1721. a will of real and personal estate was prepared in order to be executed, though several blanks in it, and the testator died before execution; yet it was held a good will for the personal estate.

And

De Term. S. Trin. 8 Geo. 2.

1 Anderf.
348. Poph.
87. Moore
254. 3 Leon.
271.

And though more was intended to be done, yet it shall stand good for what is done; as in *Butler and Baker's* case, 3 Co. 25. If a will be part writ in the testator's life, though more was intended to be written, it shall be good as far as was writ.

Then as to the second point, it was insisted, that this paper C. D. E. whether a subsisting will or not, was a revocation of the former will A. If it was a good will, there could be no doubt but it was a revocation; but if not sufficient to substantiate the devise, yet it might be sufficient to revoke the former. A testamentary will is sufficient to revoke a will solemnly executed, though it hath not the like solemnities. Vinius, l. 2. tit. 17. S. 7. fo. 379, 380.

Cowp. 52.

[454]

By the statute 29 Car. 2. ca. 3. A former will may be revoked by an obliteration made by the testator himself; and this is so; the testator obliterated that part A. and the cancelling of one part is a cancelling of the duplicate; so it was held in Sir *Edward Seymour's* case, who died 18 Feb. 1708. a little before his death he sent for his will out of his scrutore in the presence of several persons, cancelled it, and said, *I cancel my will*, and desired them to bear witness of it; and the next day told his physician, he was hot in his body, but easy at his heart, and this was looked upon as a sufficient cancelling the other duplicate that he had not by him.

But on the other side it was argued, that the paper C. D. F. in this case did not amount to a will sufficient to give the personal estate, nor did it amount to a revocation of the former will.

It was agreed, that in case the will marked A. had been compleatly cancelled, the duplicate had been thereby likewise revoked.

It was agreed by most, that the paper C. D. E. might have amounted to a good will of the personal estate, if there had been no former will (although judge PAGE, one of the delegates, doubted of that.) But the matter now to be considered was, whether this paper, not being a compleat will to pass his estate, as it was intended to be, should amount to a revocation of his former will, which was compleatly executed. And it was said, that upon all the circumstances of the case, it did not appear to be the intention of the testator to die intestate; but being willing to make some alterations of his former will, he was preparing the draught of another; but it ought not to be presumed the first was designed

De Term. S. Trin. 8 Geo. 2.

designed by him totally to cease, till his other was finished. There is no doubt but the testator by any writing directly designed for that purpose, and executed as the statute 29 Car. 2. directs, or by any cancelling, obliteration, &c. designed merely to disannul the former will, might have revoked it without more, but he designs to do it by a new will; and unless such writing be effectual to operate as a will, it shall not amount to a revocation.

And this was agreeable to the rules of the civil law, as well as to the resolutions at common law made since the statute of frauds. In the civil law the rule is laid down, *tunc prius testamentum rumpitur cum posterius perfectum est*, L. 2. ff. de injust' ruptur' irrit' fact' testament'.

[455]

So Mantuan.

So Vinus.

So Swinburn.

And Domat. 2 part, l. 3. 39. S. 5. Article 3. A first testament made in due form cannot be annulled by a second, unless the same be likewise made in due form. Vide Art. 12, 21.

It is true a will may be revoked by a military will, which requires not the solemnity in the execution that other wills have, but is executed in such due form as such a kind of will requires.

So at common law in the case of *Edleston and Speak*, 2 W. & M. it was resolved that *Anne Speak* having made a second will, and signed it in the presence of three witnesses, yet they not having attested it in her presence, whereby it was not a will sufficient to dispose her real estate, as intended by her, it was not a sufficient writing to revoke her former will, although it had all that was required by statute 29 Car. 2. to a writing of a revocation of a will,

Carth. 39.
Show. 79.
791.
3 Mod.
258. Comb.
156. Holt.
222.

So in the case of *Hyde and Hyde*, 6 Annæ, Equi. Ca. 409. c. 31. Where a man having made and duly executed a will of his real and personal estate, had a mind to change a trustee, and make some alterations, and for that intent sent for a scrivener, gave him instructions for a new will, who drew up another will pursuant to them, read it over to the testator, it was approved and signed by him, and then he took the old will out of his pocket, tore the seal off from eight sheets of it, but before he had torn off the seal from the 9th and last sheet, the scrivener asked what he did, the second was not yet perfected, and he died before it was so. And it was held that the last not being executed according to the

Rep. Cha
Temp.
Annæ 155.

[456] the statute 29 Car. 2. and consequently not sufficient to pass his real estate, was no revocation of the former will, and though the seals were torn off from eight of the sheets of the first will, in order to cancel it, yet that not being done with the intent of cancelling, unless the second will was good, should not amount to a cancelling.

Pre. Cham.
459, 1 P.
Will. 459.

It was the
intention
that govern-
ed in this
case. Cowp.
52. and see
Lord Mans-
field's opi-
nion in
Burtonshaw
v. Gilbert.
Cowp. 53.
Brown.
Parl. cas.
344. 4 Burr.
2412. 2515.

It is true the ecclesiastical court allowed the second will to be good for the personal estate, which the chancellor could not controul.

So in the case of *Onyon and Tryers*, H. 1716, Eq. Ca. 408. 2 Vern. 741. Testator having a mind to alter the trustees to his former will, ordered it to be wrote over, signs it in the presence of three witnesses, then tears seal from former will, but the second not being attested in his presence, it was held no revocation.

The case of *Burkit and Burkit*, 2 Vern. 498. is to the same effect; and all the delegates but one concurred in that opinion, whereby the sentence of former delegates was affirmed.

NOTE. Granting commissions of review is mere matter of discretion in the crown, and by no means a right *ex debito iusticio* residing in the subject. Such grants have been rare at all times, and of later years have been discountenanced to a degree that may be considered an extinction of the practice. In the last commission applied for *Heagharpe* verſus *Price* the history and nature of the prerogative of granting commissions of review was fully inquired into; and the court, in which Lord CAMBden presided, held that such a power was exercised by the sovereigns of countries in which the civil and canon law were permitted to govern the tribunals either in whole or part, such a power having taken its rise in the more corrupt ages of those systems of jurisprudence. That this power having been antiently exercised in the ecclesiastical tribunals of England, by the Pope, devolved of course to the crown, by virtue of the statutes, which transferred the supremacy at the time of the reformation; at least that it had been so held upon an adjudged case, where it was brought in question, though as Lord Cambden observed, upon very unsatisfactory grounds, as would hardly have led to such a judgment, in later times, against the positive language of statutes which declare the sentence of the delegate to be definitive. That it was a prerogative not to be countenanced, being the growth of dark and despotic times, and tending to introduce matter of favour into the regular administration of justice. Lord Cambden added, "that he thought it likely it would be the last application that ever would be made for a commission of review; at least he would venture to say, that such an application would never be successful." In Ireland (Hilary 1791) in the cause of *Eliza, Evans* against Lord *Napier*, the Lord Chancellor (FITZ-GIBBON) refused to report in favour of a commission of review, on these grounds, that the petitioner Lord *Napier*, "had no merits, and that there had been two concurring judgments against him. The Chancellor however held the right of the king to grant a commission of review as indubitable.

Term. Sanct. Mich.

8 Geo. 2. In Scacc.

Makepiece and John Leach Fletcher, and others. Case 208

EJECTMENT on the demise of *John Lees* and *Geo. Ridings* 1 July 4 Geo. 2. and upon another demise of *Tho. Illingworth*. Upon not guilty a special verdict was found to the following effect: *Robert Weild* being seised in fee of the lands in question, by indenture 1 Nov. 6 Car. 1. in consideration of his affection to his two daughters, *Anne* and *Mary*, and to the intent that his tenements should descend to them, and continue in his blood and progeny, covenanted to stand seised to the use of himself for life, and after his decease, to the use of the heirs male of his body; and in default of such issue, to the use of *Mary* his younger daughter, and the issue of her body, for the term of ninety-nine years, from the time of the death of the said *Robert Weild*; and in default of such issue, and at the end of such term, to the use of *Anne* his eldest daughter, and the issue of her body; and in default of such issue, to the use of *Helen* his other daughter, and the issue of her body; and in default, &c. to the use of the heirs male of *John Weild* his brother; and in default, &c. to the use of his sisters *Elin.* *Hall* and *Mary Woolmer*, and the issues of their bodies; and in default, &c. to the use of his right heirs.

Entry toll-
ed by des-
cent and
non-claim.

Afterwards *Rob. Weild* by his will 9 Nov. 1630. devised that his said tenements should be left and disposed to such uses intents and purposes, as he had limited by the said indenture of the 1st of Nov. 1630. and died 13 April 1631. without issue male, but left his three daughters *Anne*, *Mary* and *Helen*. [458]

21 Sep. 1641. *Anne* the eldest daughter married *Tho. Illingworth*, who at their death left *Rob. Illingworth* their eldest son and heir, who had *Tho. Illingworth* his son and heir, who is one of the lessors, and died 11 Oct. 1699.

14 April

14 April 1631. after the death of the testator, *Mary* his younger daughter entered, and married *John Sandford* 18 Feb. 1646, and died 7 Nov. 1667. leaving *John Sandford* her son and heir, who afterwards entered and was seised, and during his seisin *Robert Illingworth*, father of *Tho. Illingworth* the lessor, after the death of *Anne* and her husband, by his deed of the 13th of Oct. 1683. released all his right and estate in the premises to the said *John Sandford* and his heirs.

5 May 1717. *John Sandford* the son died, having issue *John* and other issues, and *John* his son and heir entered and was seised, and by indenture 16 & 17 Sept. 1710. leased and released to *John Lees* the defendant and his heirs, upon which *Tho. Illingworth* the lessor 15 April 1730. entered, and demised to the plaintiff; whereupon *John Lees*, and the other defendants by his direction, entered and ousted him. But whether they are guilty, or not, is submitted to the court.

And it was insisted, that by the indenture of 1 Nov. 6 Car. 1. *Anne* the eldest daughter was tenant in tail after the term of ninety-nine years given to *Mary* was expired; (which expired 13 April 1730.) and therefore upon the 15th of April 1730. *Tho. Illingworth* the lessor might well enter, as issue of the body of the said *Anne*, and make the lease to the plaintiff.

[459]

It was admitted, that by conveyance at common law a limitation to A. and the issues of his body does not make A. a tenant in tail, that the word *heirs* is necessary to make an estate of inheritance; otherwise where a limitation is by way of a use, and therefore it is said 1 Co. 100. b. That if a man has by bargain and sale conveyed his lands for monies paid to another before the statute 27 H. 8. the bargainee should have a fee simple without those words *his heirs*, which was warranted by the cases there cited, and in the case of *Leigh and Brace*, Carth. 343. 5 Mod. 266. it was resolved that a conveyance by way of use shall be always construed as a will according to the intention of the parties, and shall not be confined to the strict rules of conveyances at common law; and therefore where *Walter Brace* makes feoffment to the use of himself for life, and afterwards to the use of *Thomas Brace* and his heirs for ever, and if *Thomas* dies without issue of his body, to the use of his right heirs, it was resolved (as before it was in common pleas, 2 W. & M. in a case upon ejectment there) that *Thomas* had only an estate-tail.

Co. Litt.

9. b.

1 Andersf.

35. ca. 87.

1 Co. 87. a.

2 Ld. Ray.

101. S. C.

3 Salk.

337. Holt.

668. 12

Mod. 101.

Say. 68.

2. It was insisted, That if *Anne* had not an estate-tail by the deed she would have it by the will of *Robert Weild*, who devised that his lands and tenements should be disposed to such uses as he had limited and appointed by the said deed indented, dated 6 Nov. 1630, and this amounts to a disposition of the lands to the uses in the deed which is as much as if the uses were mentioned in his will; and if devise was to *Anne* and the issues of her body, without doubt it would be an estate-tail in *Anne*; as where a man deviseth, *I will my younger children not married shall have such several annuities, as be expressed in several writings signed and sealed by me according to the true meaning of the said writings*; it was resolved, That the will devising such rents as are mentioned in such writings was a good devise of the rents. So Salk. 225. Show. 350. Where a man having by deed agreed to levy a fine to such uses, and after by his will before a fine levied, deviseth all his lands granted by his settlement, and all estates, to his son according to the deed; it was agreed that the lands pass to the son to the uses in the deed.

3 Leon. 18.
Gibb. Tea.

275.

4 Mod. 131.

Comb. 195.

3 D. 200.

p 7.

[460]

But it was argued *e contra*, That no estate-tail was given to *Anne* by the deed, but only for life, for the word *heirs* is necessary to make an estate of inheritance in gifts in tail, as well as in feoffments and grants. Co. Lit. 20. a. 2 Inst. 334. 1 Rol. 837. And the cases cited do not contradict it, for the case cited 1 Co. 100. b. was before the statute 27 H. 8. And the case of *Leigh* and *Brace* makes the same construction of the word *heirs* in the charter of feoffment, as would be made in a will, where the word *heirs* was explained by the subsequent words for default of issue of his body, to be understood of the heirs of his body, and not of his heirs generally.

And if by the deed *Anne* did not take an estate-tail, she could not take it by the will, for the testator deviseth nothing that was not granted by the deed, nor limits no new use or estate, only that which was limited by the deed, and therefore if *Anne* by the deed took only an estate for life, she shall not take a greater estate by the devise. It is true, where a deed is not effectual, and afterwards the testator by his will devises to the uses of the deed, the estate may pass by the will, though it shall not pass by the deed, as if the will devise with reference to a feoffment where no livery was, or to a bargain and sale where no inrollment was, or to a deed by which a fine is agreed to be levied to such uses, and no fine is levied, there the estate passes by the will, which

Ante 459. which has reference to the deed (as the case was 1 Salk. 225.) although it could not otherwise pass, but no other estate shall pass, only such as would pass, if livery or inrollment had been made, or a fine levied.

[461] But if *Anne* was tenant in tail, *Thomas Illingworth* the lessor had no title of entry, for it is found by verdict, that *John Sandford* after the death of his father and mother entered, and was seised of the tenements, and it is not found that he was executor, therefore it shall be intended he was not; and his mother *Mary* having only a term of ninety-nine years, his entry not being as executor or administrator, was a disseisin; and when he after, viz. 15 May 1717, died seised, and a descant was cast upon his son and heir, who continued five years in possession, without entry or claim by *Robert Illingworth*, or *Tho. Illingworth* the lessor, the entry of the lessor was tolled by statute 32 H. 8. and by consequence before recovery by a *formedon* he could not make a demise, upon which an ejectment might be maintained.

And in Hillary term following it was argued by serjeant CHAPPLE, that the estate limited to *Helen* by indenture 6 Nov. 6 Car. not being to commence till the death of *Anne* without issue, the estate was in the interim in the testator, and he by his will could make to *Anne* an estate-tail, although by the deed she had only an estate for life. But it was answered, that the will does not give other estate, or limit other uses, only that which was limited by the deed, and if *Robert Weild* had the estate in the interim (he had it only as a use, and not to dispose of) which descended to his heir, and the three daughters being his heir, the part of *Anne* passed by the lease and release made by *Rob. Illingworth* the father of the lessor.

Co. Litt. 249. Stat. 32. Hen. 8. c. 33. Co. Litt. 239. And all the court agreed, that *Anne* had not an estate-tail but for life only; and that if she had, the entry of *Tho. Illingworth* was barred by descent and non-claim.

9 Hen. 7. 24. Dyer 143. 1 Plowd. 133. 2 Blac. Com. 312. 3 Bl. Com. 176, 177.

Termino Pasch.

[462]

8 Geo. 4.

Naiſh and Eaſt-India Company. In Scacc. Case 209

BILL in equity againſt *Eaſt India Company* to account for 20,000l. and interest deposited in their hands by the plaintiff's wife. And the caſe appeared to be this:

The plaintiff was appointed ſupercargo to four ſhips of the Company bound for *China*; and by articles between him and the Company, dated the 6th of Nov. 1729, the Company was to allow him 25 *per cent. per month* of the freight, &c. to allow him an adventure of 2000l. and to carry out any ſum not exceeding 200l. for his own uſe.

By the ſame articles *Naiſh* covenanted to be faithful to the Company, and perform the truſt repoſed in him, to inveſt their treaſure in goods, &c. to keep true books of accounts, and true journals, not to charge for goods that he bought more than he paid, nor to ſet down for goods that he ſold leſs prices than he ſold them at, not to load or bring home any gold in his own name, or in the name of any other at any time during the voyage, &c.

That in 1731. by order of the Company which ſent out other ſhips, *Naiſh* then in *China* was continued in their ſervice as *ſupra cargo*. [463]

Naiſh before his voyage made a general letter of attorney to his wife, dated 20 Nov. 1729, giving her authority to receive, ſue for, and diſcharge debts, to ſettle accounts, pay and diſburſe whatever ſums ſhe ſhould think proper, and do every thing for him that he himſelf if preſent could do, &c.

Naiſh, when in *China* ſends home 300 pieces of gold, as appears by his own letter dated at *Canton* 10 Dec. 1730, directed to Captain *Digby Dent*, to take them on board, and deliver them at *Erith*; and the next day, 25 by letter 11 Dec. 1730, ſends 64 pieces more.

D d

6 July

Not reaſon-
able to de-
cree a de-
poſit back
which is
made by
way of ſe-
curity to
any one,
where the
perſon had
a proper
power and
authority to
make it.

De Term. Pasch. 8 Geo. 2.

6 July 1731. Mrs. *Naisb* receives the gold of Captain *Dent*, prout her receipt.

14 July 1731. Mr. *Arbuthnot*, who was another supercargo, and was with Mr. *Naisb* at *Canton* in *China*, gives information to a committee of the directors of the *East-India* company in writing, that Mr. *Naisb* had acted contrary to his trust and duty, and set down greater prices for the tea and coffee he bought than what he gave, &c. He exhibited a diary of his proceedings under his hand, said he could swear, that all he informed was true, but could make no proof of them.

Upon this the Court of Directors took time to consider, and having likewise been informed of the gold brought over on the 13th of Aug. 1731. the Court came to several resolutions.

1. That it appeared, Mr. *Naisb* had carried out great quantities of silver, and had sent home great quantities of gold.

2. That he had broken his trust, violated his covenants with the company, &c.

3. That an information should be filed against him, and a bill in Chancery, &c.

[464]

4. That the chairman, Sir *Matthew Decker*, should be requested to take such measures as he should think fit, to secure his unlicensed goods, and bring his person to justice.

After these resolutions taken, it was discoursed about the *East-India* house, that a ship was to be sent to the *Cape*, or *St. Helena*, to seise the effects of *Naisb* on board the company's ships, and bring him prisoner to *England*, to answer his mismanagement in the Company's service.

Ingr. Lloyd, says to Int. 4. It was agreed in the Court of Directors to do so. *Hall* to Int. 4. That the Court threatened, and were come to a resolution to send a ship to seise his unlicensed goods, and arrest him and bring him by force to *England*, &c.

Woodford, who was solicitor to the Company, speaks to *Hall* as a friend of *Naisb*, asks what his wife intended to do to prevent a ship's being sent to seise her husband; if she took no care in the affair, it would be sent; *Hall* said, if he would have him, he would speak to her; *Woodford* replied, not from me, but as a friend of her husband you may tell her. *Hall* tells Governor *Harrison*, who was a friend of *Naisb*, this discourse; he bids him tell the wife; she in concern

concern and terror on this news for her husband's life, who was a man of spirit, said, she would do any thing to prevent it, and talked with Sir *Matthew Decker* the chairman; who said the only way to prevent it was to deposit a sum of money; and on several meetings, and proposals of 10, 12, 15, 2000*l.* said nothing less than 20,000*l.* would do; *Woodford* consulted how it must be done, and said she must write a letter to the Company, and offer the deposit; a letter was drawn by Governor *Harrison*, altered by Mr. *Barnard* her solicitor, approved by Sir *Matthew Decker*, and by his advice shewn to *Woodford*, who made several alterations, (but as Sir *Matthew* said) it was as well before, but *Woodford* must be pleased. The letter thus settled, and offering a deposit of 20,000*l.* was sent 29 Sept. 1731. the proposals accepted by the Company, and the 20,000*l.* after paid in to them at three payments, 5 Oct. 19 Oct. 17 Nov. 1731. but as *Hall* believes with reluctance, and from her apprehensions of the threats and resolutions of the Company to send such ship, &c. and then the Court of Directors resolved Mr. *Naisb* should have free liberty to come to Eng^d and as proposed.

19 May 1732. Information was filed against *Naisb* for the gold by him sent over.

1732, *Arbuthnot* died.

July 1732. Mr. *Naisb* returned to England, declared he was well pleased with what his wife had done.

7 Sept. 1733. Mr. *Naisb* by letter to the *East India* Company demands the 20,000*l.* by his wife deposited, as made by her without authority.

On trial of the information for the gold, verdict was against *Naisb* for 26,864*l.* but found the case specially, which is not yet determined, nor brought on to be argued.

On this case the Chief Baron was of opinion, that the defendants, the *East-India* Company, ought to account for the 20,000*l.* and interest.

He thought many things insisted on ought to be laid aside in the consideration of the case.

As 1. The misbehaviour of Mr. *Naisb* in China, his breaches of his covenants, &c.

2. His approbation of what his wife had done in depositing the money.

3. Nor need it be inquired, whether Sir *Matthew Decker* had any authority from the Company to act in what he did.

4. He said it was to be admitted, that the deposit was made on the terms proposed by the letters of Mrs. *Naisb.*

[466] 5. As also that she had authority sufficient to do what she did.

But the Chief Baron insisted on it, that this deposit was drawn from her artfully, and insidiously, and by false representations, and that was the only consideration to be made in this case, whether she was fairly induced to make it or not.

That where a person threatens such usage to another as he cannot legally do to him, but by violence may act against him, and thereby prevails on him to do what otherwise he was not bound to do, the act so done ought to be set aside in a Court of Equity.

That in this case it appears, what Mrs. *Naisb* did was thro' the terror and threats used to send a ship to the *Cape* or *St. Helena* to seize her husband's effects, and to seize his person, and bring him a prisoner to *England* by force: This is what they could not do by law, but this is what they threatened to do, and the terror of it was artfully insinuated to her, that it would be done.

It was agreed, as *Ingr. Lloyd* says, to be done in the Court of Directors; it was generally whispered and dis-couraged that it would be so about the *East-India* House. Mr. *Woodford*, who was solicitor to the Company, desired *Hall* to tell her it would be so, if she did not take care to prevent it; and when he bids him tell her, but not from him, it looks like an artful contrivance to make the deeper impression upon her to draw her to a compliance.

[467] Then governor *Harrison* who was a director, Sir *Matt. Decker*, who was chairman of the committee, all contribute their endeavours to the same end, and persuade her so to do. Sir *Matthew Decker* saith, resolutions were taken to do it, nothing could prevent it but a deposit of a sum of money; Governor *Harrison*, Sir *Matthew Decker* and *Woodford* join to persuade her to make an offer of such deposit by letter; frame a letter for that purpose, it must be 20,000*l.* *Woodford* varies the letter, that it may be express and positive, and not appear as if she was frightened into it; and by these means she was induced to do what otherwise she was no ways obliged to do, she was prevailed on to do it by the arts and contrivances of agents of the Company, and they had the benefit of what their agents did, the money was by these means drawn into the Company's stock,

stock, who ought consequently to repay the money with interest.

Baron CARTER concurred in opinion.

I differed in opinion, apprehending it was not fit in conscience, considering the circumstances of the case, to decree the Company to pay the 20,000*l.* deposited by Mrs. *Naisb*, unless Mr. *Naisb* had made the Company safe against his embezzlements in their service, or had shewn there was no probable ground to apprehend he had committed any.

It appears that information was given to the Company that Mr. *Naisb* had misbehaved in their service; that he had set down higher prices for tea, coffee, &c. bought for them, than what he really gave, which was a direct breach of his covenants; that he gave in the diary and journal he had kept of his proceedings, and could swear all he informed was true, although he had no other proof of the matter.

Upon this information, which was 14 July 1731, the Company took time to consider what was fit for them to do, and in the mean time discovered that *Naisb* had put on board Captain *Dent*, and brought home 364 flat pieces of gold or shoes, as they call them, worth near 50,000*l.* tho' by the absence of the witness, who had taken the exact weight, the jury on the trial found but 26800 and odd pounds; this appeared evidently true by Mr. *Naisb's* own letters to Captain *Dent*, dated 10 and 11 Dec. 1730, and by Mrs. *Naisb's* receipt for them, dated 6 July 1731, all now in proof before the Court.

Upon this discovery what has the Company done? 13 [468]
Aug. 1731, in a court of directors it was resolved, That Mr. *Naisb* had been guilty of a breach of trust and breach of covenants; that an information should be filed against him for the gold, and a bill of equity to bring him to account for his other embezzlements; and Sir *Matthew Decker* their chairman was desired to take such measures as he should think fit, to secure his unlicensed goods, and bring his person to justice.

What is there in these resolutions that was improper or unreasonable for the Company to do, or what is there in any degree illegal? here is strong proof or presumption at least, that the plaintiff was guilty of gross abuses in the Company's service; if true, what more fit than to secure his unlicensed effects, and to bring him to answer for his faults
in

in a court of justice? if they could, no body can say it was improper, or that it was unlawful for them to do it.

It may be proper to consider what power or authority the Company has in such a case; by their charter read in evidence, 10 W. 3. the Company hath power to seise in *England, East Indies*, or elsewhere, all ships, goods, bullion, &c. forfeited by statute 9 W. 3. or seisable for want of entry, or false entry in books of the Company, or for non-payment of duty of 3 per cent. or for unlawful trading, or other offence against the said act, whereupon that might be so seited, or seised by virtue of the said act.

By statute 3 Geo. 2. 14. all powers granted by any of their charters are confirmed.

So that the Company have undoubtedly a power to seise or secure any unlicensed goods carried to or brought from the *East Indies*, and every subject or body politick of the realm hath power to bring the person that injures him to justice; and when the Company authorised Sir *Matthew Decker* the chairman to do so by such measures as he should think fit, that means, and is always understood, by all lawful means. Wherever any thing is referred to the wisdom, judgment or discretion of another, it is always to be intended and interpreted according to law and justice. 10 Co. 140.

So that nothing appears in this case to have been done by the defendants, but what was lawful, reasonable and proper for them to do.

But it has been insisted, that upon the foundation of these resolutions, the agents of the Company, Mr. *Woodford* their solicitor, Sir *Matthew Decker* their chairman, and governor *Harrison* have artfully spread abroad terrifying reports of sending a ship to seise the person and goods of Mr. *Naisb*, and bring him by force to *England*; and by insinuating cunningly these menaces and designs to Mrs. *Naisb*, induced her to make a deposit, which she was not obliged to do, and unless she had been artfully wrought upon by such contrivances would not have done it.

But first, If the agents of the Company had done any thing unlawful, which the Company did not authorise them to do, they ought to be answerable for it, and not the Company: nothing is a more certain and known rule in law, than that if I command a lawful thing, and my servant do it in an unlawful manner, he must be answerable for the trespass or misdemeanour, and not the master; this

Mr.

[469]

2 Bull. 197,

108.

Hob. 158.

Callis sect.

112

Co. Lit. 227,

b.

5 Co. 100,

a.

10 Rep.

138, a.

Hard. 146.

Cro. Jac.

336.

Mr. *Naisb* was sensible of, for he at first brought his bill against Sir *Matthew Decker* as well as the Company, though before hearing he thought fit to dismiss it as to him.

And although Sir *Matthew Decker* and the others were members of the Company, yet it is well known, that the law doth not charge any corporate body with any act done by them, who are members of it, but they are answerable for all such acts personally, and in their natural capacity, unless they act by express authority from the corporation, which can't be given but by some authentic deed or writing of theirs. Now there is no pretence that there was any other resolution or act of the Company, but what has been read: *Ingr. Lloyd* indeed in his deposition expresses himself, that it was agreed in a court of directors, that a ship should be sent, &c. but what he means by its being agreed *non constat*, it might possibly be the sentiment of some of the directors, that this might be done, and they might talk or agree to do it, but there is not the least proof or colour that this came to be the sentiment, much less the resolution of the court of directors, or that any such determination was ever made by them; without which it can never be esteemed or imputed as the act of the company. Whatever some of the directors might think as to their power in that respect, it is manifest the determination was to refer it to such measures as Sir *Matthew Decker* should think fit to take, that is, as he should be advised would be proper for him to proceed in upon this occasion.

2. These that are called agents to the Company acted really as friends to Mrs. *Naisb*, and were consulted with and advised with by her as such; what Mr. *Woodford* mentioned to *Hall* was mentioned by him as to a friend of Mr. *Naisb*, and although he desired Mr. *Hall* to speak to Mrs. *Naisb* as of himself, and not from him (which is urged as a piece of art and cunning in Mr. *Woodford* to communicate what he said would be done in an underhand way, in order to make the greater impression upon her) yet there is no proof that he had any orders from the company or any of its members to do so; and in reality he not only appeared to be a friend in it to Mrs. *Naisb*, but did, as far as I can see, a real piece of friendship to the plaintiff; it was what the chief friends of Mrs. *Naisb* thought well of, and advised her to it, for Mr. *Hall* did not immediately tell her what *Woodford* said, till he had first advised with governor *Harrison*,

[470]

De Term. Pasch. 8 Geo. 2.

Harrison, who though he was a director, yet was consulted as a particular friend of the plaintiff, and really acted with friendship for him, as did likewise Sir *Matthew Decker*, who was consulted as a friend, and although they severally persuaded her to deposit 20,000*l.* as a security for her husband's coming to *England*, and abiding what the Company should charge him with, yet this was what seems to me very kind and friendly advice.

[471] 3. For what is it they advised her to do? Mr. *Naisb* was evidently guilty of several breaches of his articles with the Company; they had resolved to prosecute him for those breaches, to take the best methods their chairman Sir *Matthew Decker* upon consultation should think fit to pursue, to secure his unlicensed effects, and bring him to justice.

It cannot be denied but that they might have sent a ship to the *Cape* or *St. Helena* to seize his unlicensed goods on board the Company's ships; this is warranted by the power of their charter, confirmed by statute 3 Geo. 2. 14.

By statute 9 & 10 W. 3. 44. S. 64. No member of the *East-India* Company shall trade, but in the joint stock of the Corporation, of which they are members; and no person that shall have the management, &c. of the voyages or affairs of the Company, shall be allowed to ship or send from the *East-Indies*, any goods, &c. till sworn to be faithful to the Company, &c.

And by stat. 7 Geo. 21. all goods shipped for the *East-Indies* (not licensed) or taken out of any ship in her voyage homeward from *East-Indies* to *England*, shall be forfeited with double the value, &c.

By statute 9 Geo. 14. a *capias* may issue as the first process upon any information filed for any offence mentioned in any act for securing trade to and from the *East-Indies*, &c. upon which the offender shall be obliged to give bail to answer such prosecution, and pay all the penalties and forfeitures incurred by such offence, if convicted, or yield his body to prison.

So that not only Mr. *Naisb's* unlicensed goods might have been seized, but on filing such information as was ordered by the court of directors, a *capias* might have been taken out against his person, upon which he might have been seized or arrested as soon as he came *infra corpus comitatus*, and detained in custody, till he found bail to answer the forfeitures and penalties incurred.

What

What then do her friends advise her to do to prevent this [472]
 proceeding? Why to make a deposit of 20,000l. to abide
 what the Company should by law or arbitration recover
 from him; is any thing unjust or unreasonable in this?
 No, it was what Mr. *Naisb*, if present, ought in justice,
 in honour, in conscience to have done; and what if he
 had refused to do, he might have been compelled by law to
 do, which would have made the Company equally secure,
 though with more harsh usage, more dishonour and dis-
 grace to himself.

But it is urged, that they insinuated and inculcated to
 Mrs. *Naisb*, that they would send a ship to the *Cape* or St.
Helena to seize his person as well as his unlicensed goods,
 and bring him a prisoner to *England* by force, which was
 more than they could lawfully do, whereby she was put in
 fright and concern for the life of her husband, and thereby
 induced with reluctance to make the deposit, which other-
 wise she would not have done; the deposit being therefore
 drawn from her artfully and unfairly by false representations,
 ought to be looked upon as null and void in itself.

But to me there seems a considerable difference, where
 the thing prevailed to be done is a thing just and reasonable
 in itself, and where it is an act in itself unjust, unreasonable
 and tortious to him that does it. In the first case many in-
 stances might be given, where the thing shall stand good,
 notwithstanding some irregularity in the obtaining of it;
quod fieri non debuit, factum valet.

But to make what has been done in this case to amount
 to a fraud and imposition upon Mrs. *Naisb*, is to presume
 what does not appear in proof, and yet it is a known rule,
 that fraud is never to be presumed; the circumstances, that
 must help out the Court to determine the proceedings of
 the defendants the *East India* Company in this case to be a
 fraud upon the plaintiff, must be all extended by presump-
 tion, for there is no positive proof of them with regard to
 the defendants. It is said, the *East-India* Company came to
 a resolution of sending a ship to bring the plaintiff a pri-
 soner to *England* by force, in order to influence Mrs. *Naisb* [473]
 to make a deposit; but no such resolution appears, it is
 only presumed, because there was such discourse about the
East India house; and *Lloyd* says, it was agreed in the court
 of directors, but by whom or when it does not appear; it
 is sure no such determination appears upon the Company's
 books, or other authentic act of the Company.

It

It is said, *Woodford*, governor *Harrison*, and Sir *Matthew Decker*, treated as agents of the Company, but no authority given to them by the Company appears; it may as well be presumed they acted as friends to the plaintiff.

It is presumed, that these agents raised the rumours of sending a ship for the plaintiff by concert and contrivance with the defendants, to terrify and intimidate Mrs. *Najib*; but it may as well be presumed, that the talk arose from mistake and misapprehensions of the law in this matter: By the statute 9 Geo. 26. made to prevent his Majesty's subjects from trading to the *East-Indies* under foreign commissions, it is said, all offenders may be seized and brought to *England*, and committed to goal till they have found security to answer the offence, and not go out of the Court or the kingdom without leave of the Court.

And by statute 5 Geo. 2. 21, it is provided, that if any of his Majesty's subjects shall go to or be in the *East Indies*, contrary to the laws now in being, it may be lawful for the Company to arrest and seize such person where found in the limits aforesaid, and to send him to *England* to answer the offence, &c. This act cannot extend to the plaintiff, who went by licence, and as servant to the Company; but it is possible, nay not improbable, it might be at first apprehended to do so, till upon maturer consideration or better advice they became convinced of the contrary; so that all the discourse and talk of sending a ship, &c. was not the effect of any fraudulent contrivance to impose upon the plaintiff, but mere ignorance or inadvertency; and then the case will be exactly parallel to that of *Frank and Frank*, 17 May 19 Car. 2. where a man seized of copyhold in fee, and of freehold in tail, with remainder to his elder brother, devises the freehold to his younger, the copyhold to his elder brother; the brothers came to an agreement in writing, that each should enjoy the lands according as devised by the will; and to draw on such agreement the younger brother pretended the testator had suffered a recovery, but there was really no recovery on record, but only a commencement of a recovery, which might have been perfected, if the party had lived; the elder brother being entitled to the freehold, there being no recovery, and to the copyhold as heir, there being no surrender to the use of his will, it was insisted in Chancery this agreement was founded on a fraud, there being a pretence of a recovery when there was none. But by decree at the rolls, &c. after by the Chancellor on an appeal, the agreement stood. Ca. Chan. 84.

And as there appears no fraud in the present case, so there appears no imposition upon Mrs. *Naisb*; in what she did she was apprised of the law, as well as the defendants, and of the resolutions of the Court of Directors, had time to advise on what she did, and did long advise and deliberate about it; it was plainly proposed what was desired, and she formed her letter not only on consultation of governor *Harrison* her friend, but with *Hall* and Mr *Bernard* her own solicitor, so there cannot be the least colour or surprise or imposition upon her.

3. But what she did was not only approved by her friends, but by her husband himself after his return to *England*, who declared himself well pleased and satisfied with what his wife had done. Now indeed when he has been permitted to return home, and continue here undisturbed till he has disposed of and settled all his affairs, and all his illicit effects, when there is a verdict standing out against him for 26,800l. he would willingly get the 20000l. deposit out of the defendants hands, as well as the gold which by the absence of a witness they could not prove the value of.

If indeed the plaintiff had given security to abide the event of the prosecutions against him, if there had appeared no ground for any such prosecution, or in case the prosecutors had grossly delayed their proceeding, there might be some pretence for the desire of having up the deposit. The first pretence for the plaintiff's bringing this bill was, that his wife had no authority from him to make it, it was upon that foot he made his demand of it from the Company; but his letter of attorney to his wife being now discovered, whereby it appears she had full power from him to act as she did, he now puts it upon the foot of fraud and imposition; but as there does not appear any thing done by the defendants, but what they might lawfully do; nor any thing done by *Woodford*, Sir *Matthew Decker*, and governor *Harrison*, but in friendship and service to Mrs. *Naisb*; nor any thing done by her but what was just and reasonable in herself, and advantageous to her husband, and approved of by him, and what he was bound in honour and conscience to have done, or to give security to the Company to answer their demands against him; I cannot think it agreeable to equity and conscience to take this money out of the hands of the defendants, and pay it to the plaintiff, who approved the deposit, and has already enjoyed the advantage on his part of the terms upon which the deposit was made; unless

[475]

less he give security to abide the event of the defendants prosecution against him, or it appear there is not any reasonable ground for such prosecution.

In case there be any real fraud or imposition upon Mrs. *Naisb*, that would avoid what she did at law as well as in equity, the plaintiff may bring his action against the defendants for so much money received by them to his use; in case the money was extorted from her by illegal means, by menaces, threats or impositions, without any reasonable consideration. But if the plaintiff cannot recover at law, I do not see any just cause why equity should interpose to annul an act just and agreeable to conscience, unless the plaintiff would do what conscience and equity require, which is to make the defendants safe in respect to any frauds committed by him in their service. He expects equity should do equity.

476]

What is said, that it is hard the plaintiff should be kept out of so large a sum of money, proceeds from not considering that Mrs. *Naisb* had received the 364 shoes, or flat pieces of gold, near three or four months before her deposit, so that she was enabled out of this illicit treasure to raise the whole money before it was paid; and that there is now found a verdict against the plaintiff for more than that sum which was deposited, which if judgment be against the plaintiff upon that verdict, the defendants might seek for as they could, when the plaintiff has given no security to answer their prosecution; that if in the event of these proceedings, it shall appear there is nothing due from the plaintiff to the defendants, the plaintiff will be reimbursed the money deposited with interest.

Baron THOMPSON thought that the defendants ought to be charged with all the acts of *Woodford*, Sir *Matthew Decker*, and governor *Harrison*, since they acted for them and their benefit, and must be supposed to do so by authority, since Sir *Matthew Decker* acted by their order, and declared the Company had come to resolutions to send a ship to seize the plaintiff; and *Lloyd* said it was so agreed in the Court of Directors. But he gave his opinion against the defendants returning the deposit to the plaintiff at present.

The Court being divided in opinion upon this case, the decree was suspended till Sir *Robert Walpole* the Chancellor of the Exchequer could be at leisure to hear it, and give his opinion therein, which he did in Michaelmas term following; when the case was again argued by the counsel on both

both sides before him and the Barons, and after hearing the arguments of the counsel, the Barons delivered their opinions *seriatim* as before; after which the Chancellor gave his opinion as follows:

He was of opinion, that the money was not proper to be repaid by the Company; that he should think the Company ought to be bound by the act of the agents of the Company; but in this case he apprehended, that the transaction between the Company and Mrs. *Naisb* began 29 Sept. 1731. that then she by letter made a proposal of a deposit of 20,000*l.* to secure her husband's return to *England*, and abide the determination of all disputes at law, or by arbitration; provided they would give assurance that he should not be arrested, nor his person secured. This proposal was accepted, and the assurance given; all that preceded was a treaty to bring on this accommodation; the friends of Mrs. *Naisb* did the best they could for her, Mr. *Hall*, Mr. *Bernard* and governor *Harrisen*, formed a letter for her to write to the Company; Mr. *Woodford* and Sir *Matthew Decker* acted on behalf of the Company, did the best they could for them, altered the letters as might best suit them; Mr. *Woodford* and Mr. *Bernard* for ought I hear, were of equal abilities, and each was willing to assist his own client.

That the letter of Mrs. *Naisb* was for two purposes, to secure her husband's return to *England*, and his abiding the issue of all suits there, when returned. It is evident the last is not yet fulfilled, informations were ordered, and good ground for them; whether all the evidence appeared then which is now produced, appears not; but whether it did or not, the Company had then information of frauds committed by the plaintiff, which are now verified and made plain by letters under his own hand. It was their duty upon such discovery to order a prosecution, they could not otherwise answer it to the world, nor discharge their trust to the Company; this therefore is done, an information was filed, is now depending; he hath given no other security to answer the Company's demands; and as this deposit of 20,000*l.* is the only security they have, and Mrs. *Naisb* had power to make it, I think it not reasonable to take this security from them.

Chief Baron, and Baron CARTER. Then the plaintiff's bill ought to be dismissed; which being objected to by the counsel for the plaintiff, the other Barons were for retaining it till the end of their suit depending. To which I said,

[478]

said, that the opinion of the Chief Baron and Baron CARTER being, that the 20,000l. should be repaid by the Company with interest, I and Baron THOMSON were against the repayment, at least till the event of the information now depending appeared, upon which possibly more than that sum might be recovered from the plaintiff. But since it was then objected, that the detainer could not be decreed on that bill, and the plaintiff may by new bill (having made the Company safe) be relieved, I am not against the dismissal.

Case 210. The King and Frances and others. Before all the Judges at Serjeant's Inn.

On a special verdict in an indictment for a robbery on the highway, the words "Then and there immediately," do not sufficiently ascertain the time to find the prisoners guilty.

AT the assizes held at *Wells* for the county of *Somerset*, 31 July 7 Geo. 2. before Chief Baron REYNOLDS, *John Frances* and five others were indicted for a robbery in the highway upon one *Samuel Cox*; and the Chief Baron being doubtful upon the evidence, whether the offence amounted to robbery, directed it to be found specially.

And it was found, that *Samuel Cox* travelling on the highway toward *Somerton* fair saw the prisoners in the road standing in company together, save that one of them was lying in the road upon the ground; *Cox* passed by them, but one of the prisoners called to him, and desired him to change half a crown, that they might give something to a poor *Scotchman*, meaning the person that was lying upon the ground; that thereupon *Cox* came back, and putting his hand in his pocket intending to pull out money to change the half crown, pulled out some pieces of gold, viz. four moidores, and a Portugal piece value 3l. 12s. that *Cox* having the pieces of gold in his hand, the defendant *John Frances*, (he and all the other prisoners being in company together) gently struck his hand, whereby the pieces of gold fell on the ground; that *Cox* got off from his horse, and said he would not lose his money so; that *Cox* offering to take up the pieces of gold then lying on the ground in his presence, the prisoners swore, that if he touched them they would knock out his brains, whereby *Cox* was put in bodily fear of his life, and desisted from taking up the said pieces of gold.

[479]

And the jury further find, That the said prisoners then and there immediately took up the said pieces of gold and rode

De Term. Pasch. 8 Geo. 2.

rode off with them, that *Cox* immediately pursued and rode after them about half a mile, and then the prisoners struck him, and his horse, and swore if he pursued them any farther they would kill him, upon which *Cox* ceased to continue his pursuit any farther, *et si super totam materiam, &c.*

Upon this special verdict the justices of the King's Bench were doubtful whether the verdict had found the fact so certainly that they could determine it to be a robbery, and therefore they desired the opinion of the other Judges who met at *Serjeant's-Inn-Hall*; and it was argued by counsel for the crown, and for the prisoners; and upon consideration the Judges seemed generally to think, that the finding of the jury was not so plain and certain that the Court could pass sentence of death upon the prisoners.

It had been insisted on, that although the prisoners did not at first use force, but gently struck *Cox's* hand, upon which he dropt the gold, and so there was no putting him in fear, yet what was found after seemed to find a fact that had all the essentials of that offence, which the law calls robbery, which is a forcible or violent taking of goods from the person of another, putting him in fear. 3 Inst. 68. H. P. C. 73. That taking goods from his presence was always held to be a taking from his person, if by force and putting him in fear; and therefore if a man have his horse or coat by him, and a thief by force putting him in fear, take it away, it is robbery. H. P. C. 73. Or if he take cattle by force out of a field, the owner being present and put in fear. H. P. C. 73.

Then laying the first part "gently struck his hand," out of the case, it was after found that the money was lying on the ground in his presence; and then the prisoners swore if he touched it they would knock his brains out, upon which being put in fear he desisted, and they took it; that when they gently struck the money out of his hand, he did not lose the property, but the property continued in *Cox*, and the money was his still, though lying on the ground; and then when the prisoners by threats which put him in fear forced him to desist from taking it up, and they immediately took it up, this is taking from his person, being a taking of his goods by force in his presence, and putting him in fear. And though it is not found that they took it in his presence, yet if it be all one continued act, the force, the putting in fear, and the taking, it will be sufficient; for the cases put

2 Hawk.
494.
Keyl. 68,
69.
Dyer 224.

Leach's cro.
cases, 199,
203, 207,
214, 225,
257, 260,
264, 365.

[480]

Stamf.

Stamf. P. C. 27. Crompt. Just. 30. 3 Inst. 69. If a thief assault a true man in the highway to take his purse, and he in flight to escape, throw his purse into a bush, or his hat fall off, and the thief perceiving it, take up the purse or hat, it is robbery, were allowed to be good law; because as Lord COKE says, it was at the same time; from whence it was inferred, that here it being found, that when COX by force and terror desisted from taking up his money, and the prisoners then and there immediately took it up, that was sufficient to denote the time of taking to be one and the same with that in which the money was forced from him by those threats which made him desist from taking it up.

Kelw. 72,
111.
4 Burr.
2073.
Stran. 1015.
Doug. 207.
Cowp. 830.
2 Haw.
627.

2 Haw. 334,
335.
Hect. 35,
119, 120.
5 Hen. 7,
17, 18.
[481]
1 Bull. 203,
204.

But the Judges seemed unanimously to agree, that the case was to be considered upon the special verdict, and that was not to be made good by intendment or construction. It was not denied, but that if a thief set upon a man to rob him, and he throw away his money or his goods (being near him and in his presence) and was forced away by terror, and the thief took them, it would be robbery; and therefore here possibly it might have been well, if the jury had found, that when COX desisted, the prisoners at the same time, or without any intermediate space of time, or instantly took it up; but the word *immediately* has great latitude, and is not of any determinate signification; it is in dictionaries explained by *Cito*, *Celeriter*; in writs returnable *immediatè* it has a larger construction, as soon as conveniently it can be done. In *Mawgridge's* case it is twice mentioned, but with words added to ascertain it, as *without intermission, in a little space of time, &c.* In the statute 27 Eliz. it is directed, that notice be given as soon as conveniently may be; in the pleading that is usually expressed by *immediatè*; so that *then and there immediately* doth not necessarily ascertain the time, but leaves it doubtful; besides, it is proper to take notice, that in this verdict the words *then and there immediately* are not coupled in the same clause or sentence with the words preceding, but it is a distinct clause, and a separate finding.

The Court of King's Bench (pursuant to this opinion of the majority of the Judges) held, that the defendants ought to be discharged of this indictment. Then a question arising, whether the defendants ought to be discharged out of custody? It was held that they should not, but that they should be remanded; for though no robbery is found by the verdict, yet it appears that they are guilty of grand larceny, for

De Term. Pasch. 8 Geo. 2.

for which no judgment can be given upon this indictment; for this differs from burglary and other cases, where the prisoner may be acquitted of the burglary, and found guilty of the felony; but here the offence is laid to be a robbery in taking *a personâ*; and that being the only doubt of the jury, the Court cannot give judgment against them upon this indictment, but must discharge them as to it, and remand them in order to be tried upon a new indictment for the grand larceny.

Attorney General and Perry. Intr. in Scacc'. Pasch. Case 211
7 Geo. 2. Rot. 29.

INFORMATION by Attorney General for £23l. 14s. 3d. $\frac{1}{2}$ due to his Majesty for so much money received by the defendant for his late Majesty's use, between April 1. 1725, and 1 Sept. following.

The defendant pleads, that he is not indebted for the said sum.

Upon a trial by a jury of *Middlesex*, they find specially to the effect following, viz. That on the 24th of Sept. 1724, the defendant imported into the port of *London* 28333 pounds weight of Virginia tobacco, and paid custom for the same, viz. 88l. 10s. 9d. $\frac{1}{2}$ for the old subsidy, and gave security by bond to pay 5:5l. 3s. 6d. $\frac{1}{2}$ for the additional duties due to his late Majesty on importation of the said tobacco. That in May 1725, the defendant sold the said tobacco to *Richard Corbet* for exportation to *Cadiz* in *Spain*, and shipped off the same in the port of *London*, in the ship called the *Francis & Mary*, *Isaac Cocart*, master for *Cadiz*. That on the 14th of July, 1725, *Richard Corbet* made oath before the proper officer, that he had the direction of the said voyage, and that all the said tobacco so shipped was exported really and truly for parts beyond the seas, on commission, and that none of the said tobacco had been since landed, or was intended to be relanded in *Great Britain* or *Ireland*.

That *John Walkely* the defendant's servant made the usual oath, that the duty of the said tobacco was paid or secured, and that the defendant had sold it for exportation. That 5 June 1725, a declaration of the contents of the loading of the said ship was made in these words, *A content in the Francis & Mary, Isaac Cocart, for Cadiz, 40 ton, 5 men, 4 guns, 1 38. Micha. Perry, &c.* That the same day *Isaac Cocart*

Money received for the drawback of goods and merchandizes, not fairly exported according to the statute, liable to the King's demand, though in the hands of a third person not "particeps criminis."

[482]

Corbet made oath under the said content before the proper officer, that the said content did contain a just and true account of all the goods, &c. on board his ship for the present voyage, and he would take no more goods on board without first paying custom, and having a warrant from the King's officers; and if he should take on board any certificate goods, or goods that receive a drawback, bounty or premium on exportation, he would not reland them, or suffer them to be unshipped in order to be relanded, without presence of the King's officers.

[4^c3]

The said tobacco being put on board the ship, and certified by the proper officers of the customs, two debentures were made out; one for drawback of 88l. 10s. 9d. $\frac{1}{2}$ the other for the drawback or discharge of the 535l. 3s. 6d. $\frac{1}{2}$ secured by the defendant, upon which the defendant the 13th of August 1725, received back the 88l. 10s. 2d. $\frac{1}{2}$. and on the 17th of August 1725 had his bond for the 535l. 3s. 6d. $\frac{1}{2}$ delivered up to him.

That this tobacco after it was put on board was landed in *Ireland*, 28 July 1725, but without the defendant's privity, nor had he the property in it from the time it was put on board, nor the direction of the voyage, but was sold by defendant for 1269l. 11s. 2d. for exportation to the said *Richard Corbet*, whereof 645l. 16s. 10d. $\frac{1}{2}$. was paid in money, and the debentures were taken for the remainder of the price, and if by any accident the debentures became void, the said *Richard Corbet* was to answer the amount in money to the defendant.

That *Richard Corbet* hath been absent five years, but the King's officers had no notice of the tobacco's being landed in *Ireland*, till June 1733. *Et si supra totam, &c.*

It was argued by the *Solicitor General*, that the money the defendant received by the debentures for the drawback, was money originally due to the King, and nothing had been done which should divest the King's right to it, and consequently the defendant receiving the King's money must be indebted to him.

By the statute 12 Car. 2. 4. and the statute which gives the additional duties, the monies given are due to the King, and though by the book of rates a drawback is allowed on exportation, that must be a real exportation, for by statute 13 & 14 Car. 2. 11. S. 12. 3. if goods shipped out be relanded, &c. no allowance shall be demanded or made for those goods. And by statute 4 & 5 W. & M. 15. S. 13.

no person shall be allowed to swear to a debenture for any duties to be drawn back upon re-exportation, but he who is the true exporter as being interested in the propriety and hazard of the goods, or as being employed by commission, is concerned in the direction of the voyage, so as to be able to judge that the goods are really & *bona fide* exported and landed or intended to be re-landed, &c. And the debenture for the duties on tobacco by stat. 7 & 8 W. 3. 10. S. 5. is to be in parchment, and the duty printed on it *in hæc verba*, and signed and sworn by the exporter. By stat. 7 Ann. 13. S. 16. reciting, That by law every person importing tobacco or other foreign goods is entitled to a drawback of the duties paid or secured, &c. If tobacco, &c. for which drawback or debenture for it is to be made, be re-landed, exporter forfeits double value of drawback, &c. By stat. 6 Geo. 6. 21. S. 49. if any tobacco exported be landed in *Ireland*, the same and double the drawback of it shall be forfeited, and every debenture for the drawback shall become void, as if the tobacco were re-landed in *Great Britain*. [484]

Since therefore the defendant received from the King's officers the sum of 88l. 10s. 9d $\frac{1}{2}$. and his bond for 555l. 13s. 6d $\frac{1}{2}$. under colour of two debentures, which were in themselves void by reason of the landing the tobacco in *Ireland*, before the receipt of the money (for the verdict finds the tobacco was landed in *Ireland* 28 July 1725. and the 88l. 10s. 9d $\frac{1}{2}$. received back 13 August, and the bond delivered up on the 7th of August following) this is money received from the King's officers without any proper authority, and consequently is money received to the King's use, and the defendant is chargeable for it on that account.

It was insisted on the other side by Mr. STRANGE, and after argued by Mr. *Attorney General* for the Crown, and Mr. BOOTLE for the defendant, in Mich. term ensuing; and by Mr. BOOTLE it was also insisted,

First, That this was a case of great hardship on the defendant, who was an innocent person, guilty of no fraud; for the jury find he had sold his goods for exportation, and all was done the law requires should be done to secure against the tobacco being re-landed; they were entered with the custom house officers for *Cadiz* in *Spain*; they were shipped for *Cadiz*; the declaration of the contents of the loading for *Cadiz*; *Corbet* made oath he had the direction of the voyage, that the tobacco was really *bonâ fide* exported for parts beyond the sea, and the defendant's servant made oath that they [485]

they were sold for exportation; and the jury expressly find that the landing in *Ireland* was without the defendant's privity; and if after all this the defendant shall be answerable for the default of the buyer, no merchant can be safe.

That the case was harder still in the information against the defendant and others as executors, for as *nullum tempus occurrit regi*, the executor may be charged after all the assets disposed, and yet the King ought to be preferred.

2d, It was argued that the exporter is the person only liable, and *Corbet* was the exporter. By stat. 4 & 5 W & M. 11. S. 13. it appears who is the exporter, he that is interested in the propriety and hazard of the goods, or he who being employed to act by commission is concerned in the direction of the voyage, and no other is to take the oath which intitles to the drawback; now the jury finds *Corbet* had the property of the goods, and not the defendant; that *Corbet* took the oath, and as he only entitled himself to the drawback he only is answerable for it. If the goods be afterwards relanded, he forfeits double the value. By stat. 7 Ann. 13. S. 16. and by stat. 6 Geo. 21. S. 49. But as the defendant is found not to have the property of the goods, not to be concerned in the voyage, and consequently could not run any hazard in it, as he did not take the oath, and was not intitled to the drawback, he ought not to suffer by any default of *Corbet*, who was the owner.

[486] 3d, That the defendant in this case did not receive the money to the use of the King, but to the use of *Corbet*, and as servant or agent to him; the verdict finds it was received for the satisfaction of *Corbet's* debt, and then it must be to his use; suppose *Corbet* had received the money himself, and paid it to the defendant, and after relanded the tobacco, should the defendant have been charged? Why then, when he takes the debenture and receives it to pay himself? In the case of *Tomkins and Barret*, 1 Salk. 22. where three were bound in a bond upon usurious contract, and one paid part of the money, and after the obligee sues another obligor who pleads the statute of usury, whereby the plaintiff was barred and the bond avoided, now the obligor who had paid part of the money on this bond brings assumpsit for it as for money received to his use; but it was held by Chief Justice TREBY that it did not lie. In the case of *Cary and Webster*, Mich. 8 Geo. *Cary* anno 1720 paid 500l. to *Webster* then a clerk to the South-Sea Company, which was paid over to the Company in reality, though omitted to

be entered as paid ; it was held by Chief Justice PRATT at *nisi prius*, that the money being received by the defendant as servant to the Company and paid over, the Company only was chargeable for the receipt of the money, and not the defendant ; but if he had not paid it over, then indeed the plaintiff might have sued him, or the Company, at his election.

To which Mr. BOOTLE added, that all actions of this nature must arise *ex contractu* or *ex quasi contractu*, and in both cases privity was necessary ; but here is no privity between the King and the defendant, the dealing was with *Corbet*, he was intitled to the drawback and had the debenture for it, and consequently must be responsible for it to the King ; the King cannot follow his debtor to the second or third degree ; as this would be inconvenient, such measures should be taken as may avoid it, as may encourage commerce, which will be impracticable if the vendor shall be answerable for the default of the buyer.

Mr. *Solicitor General* in reply, and Mr. *Attorney General* more largely in his argument to Mr. BOOTLE, insisted, that they did not charge the defendant in this case with any fraud in relanding the tobacco, or obtaining the debentures, or repayment of the money or bond, since by this information the defendant is not charged for any forfeiture, nor yet for any fraud, or for any duties due from him to the crown, but merely for the King's money by him received, in the same manner as any other person might be charged who should receive the money of the King or any subject ; and therefore he would admit, what had been so much insisted on, that the defendant was an innocent person, that he was not the exporter, that he received the money towards the satisfaction of his debt from *Corbet*, and that it was an hard case *Corbet* should defeat the debenture given him in payment.

[487]

But it must be admitted, for it is expressly found, that the defendant received the money from the officers of the crown, and that he received it by colour of those debentures the 13 & 17 Aug. whereas the tobacco, for the drawback of which these debentures were given, was landed in *Ireland* on the 28th day of July before.

Now the drawback to be allowed by the book of rates, which is confirmed by statute 12 Car. 2, is upon exportation, if exported by a foreign merchant in twelve months, by an home merchant in eighteen months ; and by a subsequent

quent act the time hath been extended to three years; so then if the goods be not exported, no drawback is to be paid; and if any debenture be given for it, it is null and void. But this appears more expressly by statute 13 & 14 Car. 2. 11. S. 12. where it is said, that if goods shipped out on which the drawback was allowable be reloaded, no allowance shall be demanded or made, surely the debenture must be void, if nothing can be demanded or paid upon it. So by statute 6 Geo. 21 S. 49. which more directly relates to the present case, it is said, if tobacco to be exported be landed in *Ireland*, the debenture for the drawback shall be void.

It was said by one of the defendant's counsel, that the act did not make it absolutely void, but saith, it shall become void as if re landed in *Great-Britain*. But can it be imagined these words import, it shall not be void, that the penalty for landing in *Ireland* should make the debenture for the drawback good, for so it must be if it is not become void? This would be a strange construction, but surely no words can more plainly denote, that the debenture for the drawback before was void, if the goods shipped for exportation were reloaded in *Great Britain*, and so it shall be for the future, if they landed in *Ireland*.

[488]

Now this being the case, that the debenture was void by landing in *Ireland*, the defendant could not be intitled to receive any money upon it; and he that receives the money of the crown, without any title to it, ought to pay it back again. Nothing can be a plainer and more evident position than this, that if a person demands money from an officer of the crown, who pays it, upon supposition it was due, but it after appears not to be due to him, it is money received to the use of the King, and ought to be restored.

And this is not a demand the King makes by virtue of any particular prerogative peculiar to the Crown, but the case would be the same in regard to any common person; so that this information is not otherwise to be considered than as an action on the case by a subject, who, in case any one shall demand or receive money from him without any title or authority for doing so, shall recover it back in such an action as money received to his use. The case cited Sal. 22. may be good law, (although it was only by a Judge at *nisi prius*, where matters may not be maturely considered) because when a person is party to an usurious contract, and hath actually executed the contract he made, it may not be reasonable to allow him to unravel his own act, after he

hath

hath freely carried it into a compleat execution. But in the same case it was agreed, that where a man pays money on a mistaken account, or under or by a mere deceit, he may recover his money back again. So a case is there cited, that where one bound in a policy of assurance paid his money, believing the ship was lost, when it was not, it was held, an assumpsit lay to recover it back. The case of *Jacob and Allen*, Salk. 27. is much stronger; there H. having letters of administration to one, who was supposed to die intestate, who collects several sums, and pays them to the administrator; after a will was discovered, the administration recalled, and an assumpsit brought by the executor against the defendant for monies received to his use; and held the action lay, for the administration was void, and so the defendant acted without authority; and then there was nothing to hinder the raising an implied contract, and the charging the defendant in an *indebitatus assumpsit*; altho' it was urged, that the money being received by a special authority, and for a particular purpose, and after paid over to the administrator, the action ought to have been brought against the administrator, and not against the defendant, who acted as his servant, and had paid the money to him; at least a special action on the case should have been brought, and not an *indebitatus assumpsit*; and the case *Carcy and Webster* is not like this, for there the plaintiff paid his own money to the servant for his master, and he paid it over accordingly.

[489]

But it is objected, the drawback was paid to the defendant as *Corbet's* agent, and for his use.

But how could he receive that for the use of *Corbet* which was the price of his own tobacco, and received for his own use?

It is likewise said, *Corbet* is liable to this demand. It is true, he is liable for the forfeiture for the double value for the fraud; but how is he liable for this money he did not receive, which the defendant received for himself, and not for him? Besides, if *Corbet* were liable, may not a person that hath two remedies take either? Or if he hath remedy against several, may he not come against which he pleases?

As for the inconveniences alledged, though they are no greater than in the case of any subject, yet in case the law be against the defendant, they may be arguments for an alteration to the legislature, but this Court must determine according to what the law now is.

After

De Term. Pasch. 8 Geo. 2.

[49^c]

After Mr. *Attorney General* had finished his reply, Mr. Alderman *Perry* the defendant, desired he might speak for himself, which was allowed; and he represented the hardship of the case against him, the fairness of his dealing, the danger of his ruin, if after so many years acquiescence he should be called to an account for all monies received by him and his father on debentures, in case it should be discovered that these debentures were void. But not desiring any further argument, but referring himself to the judgment of the Court, the Court took time to consider the matter till next term.

And on full consideration of the case, REYNOLDS, Ch. Bar. CARTER and FORTESCUE Barons, against THOMSON, were of opinion,

First, That the debenture for the drawback given by *Corbet* to the defendant, by landing the tobacco in *Ireland*, became void; for no drawback ought to be made unless the goods be exported; the words of the statute 13 & 14 Car. 2. 11. are express, *No allowance shall be made or demanded, if the goods be re-landed, &c.* And so by statute 6 Geo. 21. if landed in *Ireland* the debenture for the drawback shall be void.

2d, That the payment of the money to the defendant by the King's officers upon this void debenture renders the defendant answerable to the King for the money by him received; for whoever receives the King's money, without warrant or lawful authority, is accountable to the King for it. This is expressly resolved by two Chief Justices and Chief Baron, 11 Co. 90. the Earl of *Devonshire's* case, who was master of the ordnance, and by privy seal 2 Jac. reciting that munition utterly decayed and unserviceable had been claimed as fees and vails to the master of the ordnance, by reason of his said office belonging; and giving him authority to dispose such of them as were set down in a book, &c. he had disposed of several pieces of iron ordnance, shot and munition in the said book set down; for those things being received and disposed by him by colour of a privy seal, which was void, because founded on a false suggestion, (for it suggests these were fees or vails claimed as belonging to the said office, which must mean lawfully claimed and lawfully belonging, which was not true, for this was a new office erected 35 H. 8.) the Earl was accountable for them as much as if he had taken them without any privy seal. So in Sir *Waiter Mildmay's* case. cited 11 Co. 91. and reported

2 Roll. 161.
Co. Lit. 90,
b. §. 125.

ported Cro. Eliz. 545. who being Chancellor of Exchequer O. Bendl. received 140l. a year for thirty years together, by warrant ^{74.} from the Lord Treasurer, as an augmentation of his fees, ^{Godb. 190,} since the court of wards was annexed to the Exchequer, ^{296.} whereby his labour was much increased; but because such ^[491] warrant was void, it was resolved he should answer for the ^{Swinb. 329.} monies he had received. ^{2 Roll. rep. 295.}

And this is not from any peculiar prerogative the crown ^{Moor 473,} hath above a subject, for the case would be the same with ^{475.} regard to a common person; whenever a man receives mo- ^{Skin. 656.} ney belonging to another without any reason, authority or ^{2 Burr. 1012.} consideration, an action lies against the receiver as for mo- ^{3 Burr. 1355.} ney received to the other's use; and this, as well as where ^{4 Burr. 1984.} the money is received through mistake under colour, and ^{5 Burr. 2592, 2613.} upon an apprehension, though a mistaken apprehension of having a good authority to receive it, as where it is received by imposition, fraud or deceit in the receiver (for there is always an imposition and deceit upon him that pays, where it is paid) by colour of a void warrant or authority, although the receiver be innocent of it.

Cases might be cited to warrant every part of this rule; but as the defendant appears to be an innocent person, wholly ignorant of the fraud of *Corbet* in landing the tobacco in *Ireland*, and one who thought he had a good debenture, and was lawfully entitled to receive the drawback; it is necessary to instance only cases where the party receiving thought at the time of his receipt that he had a good authority to do so, but after discovers he had not; as where a man having a grant of an office or conveyance of lands, and thinking himself well entitled, receives the rents and profits, it is well known that if it after appear the grant or title is not good, the receiver is chargeable by the rightful officer or owner of the land for so much money received to his use. ^{2 Mod. 260, 263. 2 Jon. 127. 2 Lev. 245. 3 Lev. 262.}

The cases cited by Mr. Attorney General are strong to the same purpose. A man insuring the ship, on rumour that the ship is lost pays the insurance, it after appears the ship is not lost, the insured shall pay back the money. ^{1 Salk. [492]} 22. And *Jacob and Allen*, ^{Post. 493.} *Salk. 27.* 2 Ann. By *TREVOR* ^{Mod. Caf. 151, 161,} Chief Justice, if administrator authorises A. to collect debts ^{309.} and effects of his intestate, which he receives and pays over, ^{2 Ld. Ray. 1216.} and then a will is discovered, the rightful executor may bring assumpsit against A. for what he has received, as money

money received to his use; It was there insisted, that A. was only agent for the administrator, received the money for his use, and paid it to him; yet held that the administration being void, the administrator could give no authority, and consequently A. received without authority, and then nothing hinders the raising an implied contract, and charging the defendant in an *indebitatus assumpsit*.

So in the case of *Martin and Sitwell*, 1 Show. 156, where *Barkedale* had made a policy of insurance for 5*l. premio* in the plaintiff's name, and paid the money to the defendant, and it after appeared the defendant had no goods on board, upon which *Martin* brought assumpsit for the 5*l. premio*; and it was insisted, this was money received from B. and to his use; but as *Martin* was trustee for B. the payment by B. must be taken as agent for him; whereby it is plain, that there is no force in that objection that the defendant acted as agent for *Corbet*, and received the drawback by his authority, and for his use.

But it is further objected, that *Corbet* being the person who committed the fraud, who was the exporter, and intitled to the drawback, the Crown ought to pursue their remedy against him, and not against the defendant, who was innocent, and took this money only in his own behalf, and for satisfaction of a debt owing to him from *Corbet*.

It is sure, for any penalty forfeited by the landing in *Ireland*, *Corbet*, and not the defendant, ought to be prosecuted; but when *Corbet* obtains a debenture, which he himself makes void and ineffectual, and delivers this debenture as payment for the tobacco he bought of the defendant, what need is there to resort farther than to him who had the money from the Crown? *Haffer and Wallis*, H. 6 Ann. King's Bench, Salk. 28. A man marries a woman seised of lands, and takes the rents and profits, but after it appears he had a former wife then living; upon which she brings assumpsit against the husband for money received to her use; and though objected, that the payment to him, who had no authority to take the rents, was absolutely void, and so the tenants might be sued, for the money still lay in their hands, and they might sue *Wallis*; yet the Court held the action was maintainable against *Wallis* who received the rents, and recovery against him would be a discharge to the tenants.

De Term. Pasch. 8 Geo. 2.

As to the case of *Tomkins* and *Barnet*, Salk. 22. upon an usurious contract, the case appears to be good law; the same case is *Skin.* 411. But there is a mistake in one of the reports, for Salk. saith it was in the Common Pleas, and came to trial before Chief Justice TREBY, SKINNER, That it was in the King's Bench, and came to trial before Chief Justice HOLT; unless it can be supposed, that the same case, which in both reports is said to be H. 5 W. & M. should after nonsuit in one Court, be brought on to trial in the other Court; for this is an exception to the general rule, that where a man receives money for an unlawful purpose, or upon an illegal contract, he who is party to the unlawful act shall not exempt himself, and defeat what himself hath done, by falling on his accomplice, who is not more criminal than himself; as in the case there put, if a man gives money to A. to bribe the custom-officers, who pays it accordingly, he shall not afterwards charge A. for this money as received to his use.

So if a man gives bond upon an usurious contract, and pay part of the money, and after an action is brought on the bond, to which the statute is pleaded, and the bond thereby avoided, he who paid part shall not maintain an action against the receiver, as for so much received to his use, for he was party to this usurious agreement; and tho' an act of parliament makes the bond void, yet it is only to him who claims the benefit of the statute and pleads it; for if he plead *non est factum*, or *solvit ad diem*, the plaintiff will recover; if then he pay the money, he waives the advantage of the statute; and a party equally faulty, who pays his money pursuant to a faulty agreement, ought not to have it back again; so that the reasons given by TREBY, that the plaintiff in such case is *particeps criminis*, & *volenti non fit injuria*, seem not altogether so improper. [494]

The objection made, that in this case no privity was between the King and defendant, was likewise made in the Earl of *Devonshire's* case, 11 Co. 90. and in Sir *Walter Mildmay's* case there cited; but it was there answered, that in the case of the Crown the law will raise and create a privity so as to render him accountable who receives any of the King's money.

And in case the defendant be chargeable, the executors will be so likewise, they were resolved so to be in both these cases.

"Indebitatus assumpsit" lies for money paid by mistake, but not for money paid knowingly, for a legal consideration.
2 Lev. 3,
17, 153.
1 Lev. 164,
5, 273.
Mod. Cases
77.

2 Roll. 161.
10 Co. 114,
b.
Cro. El.
224, 508.
Br. acc. 8,
65.
Br. Bailey
25.
Dyer 549.
pl. 83.
Moor 476.
1 Term.
rep. 602.

All

All the Barons agreed that the delivering up the bond could not be considered as money received to the King's use; and therefore it was adjudged by the Court, that his Majesty do recover against the said *Micajah Perry* the sum of 88l. 10s. 9d $\frac{1}{2}$. being so much by him unjustly received in money of the officers of the customs for the duty inwards, called the old subsidy; but as the residue of the said 623l. 14s. 3d $\frac{1}{2}$. in the said information mentioned, that the said *Micajah Perry* do go without a day as to such residue, saving his Majesty's right, if he shall think fit hereafter to prosecute him for it.

Case 212 Bayley and Warburton and others. In Scacc'.

Whether a lease for years, by tenant for life, in pursuance of a particular power, shall be good against him who claims in remainder.

EJECTMENT on demise of *John Crew*; on not guilty at assizes at *Chester* 24 Sept. 5 Geo. 2. before Chief Justice of *Chester*, a special verdict was found, that the grandfather of the lessor being seised in fee, on his marriage with *Lucy Birom* his second wife, by lease and release 23d and 24th of Feb. 35 Car. 2. settled the lands in question *inter al'* to the use of himself for life, then to *Lucy* his wife for life, then to the issues of that marriage; then to the use of *Anne* the wife of *John Offley*, who was his eldest daughter by his former wife, and the heirs of her body, and for want of such issue, to the use of *Elizabeth* his youngest daughter by his first marriage, and her heirs, with a power to himself to make leases.

Provided also, that it may be lawful for the said *Lucy*, during her life, to demise the premises to any person for such term, with and under such conditions, rents and reservations, in such manner to all intents as tenants in tail may do by statute 32 H. 8. for the term of one, two or three lives, upon and under such reservations and rents, and in such manner as tenant in tail is enabled to do by that statute.

That *John Crew* died leaving no issue by *Lucy*, and no children by former wife but *Anne* the wife of *Offley* and *Elizabeth*; upon which *Lucy* entered and was seised for life remainder to *Anne Offley* in tail who died 11 May 1711 (her husband being before dead) leaving issue *John Crew* the lessor of plaintiff, whose name was changed by act of parliament from *Offley* to *Crew*) her son and heir.

De Term. Pasch. 8 Geo. 2.

That *Lucy* married *Edward Turner*, and after his death *William Frowd*, and that by indenture 2 June 1713. the said *William* and *Lucy* being of full age demised the premisses to *John Ryland*, one of the defendants, in consideration of 26l. and surrender of former lease from *Edward Turner* and *Lucy*, on which were two lives subsisting, To hold to *John Ryland*, and his heirs from the making hereof, during the lives of his sons *Richard* and *Isaac*, and *Mary Norbury*, widow, yielding 11. 4s. 8d. yearly, during the term, an heriot, the best good of every person who (possessed by force of demise) dies seised, all such boons, duties, services, averages and customs as have antiently been paid, doing suit twice a year on lawful summons, with clause of re-entry for non-payment. [496]

That at the time of this demise the premisses let were not in the hand of any farmer, and were before most commonly let for 21 years; that the rent was the usual rent, and the demise was made with all the requisites necessary to be observed by tenants in tail in making leases, and according to the form of the statute 32 H. 8.

That lessee entered, after which *Lucy* died Feb. 20, 1724, upon which the lessor entered as in remainder, and made one lease in declaration 10 May 1726.

On this special verdict the question was, Whether this lease to the defendant was good against the lessor of the plaintiff, who claimed in remainder? And it was insisted upon it was not.

First, because the lease was made by *Lucy* and her husband, whereas the power was given to her alone, and so the power was suspended by her marriage. *Sed non allocatur*; for a power given to a single woman, if she marry, may be executed by her husband and her; Resolved on a special verdict between *Harris* and *Graham*, Mich. 11 Car. King's Bench, where a man devised to his wife for life, and by his codicil gave her power to lease for six years, she married, and her husband and she made lease for six years; and held good. So it was resolved 1 Sid. 101. in Chancery, by *Bridgman* and *Hale* and Lord Chancellor, between Duke of *Bucks* and Lord *Antrim* and his wife, who executed such lease, the power being to his wife alone; the same case seems indeed reported Cha. Ca. 18. and there it is said, that *Bridgman* held the execution by husband and wife

1 Roll. abr.
329, pl. 12.

wife ill, where an interest passed; otherwise, where it was a nude power; but HALE thought it might be fit to be argued, and the Chancellor concurring with *Bridgman*, the bill was dismissed. This case is cited 3 Salk. 276. but there and in Chan. Ca. 18. the power given to the wife to lease is said to be (being sole) and so recited Equi. Ca.

[497]

2d, That the lease by *Lucy* and her husband ought to have been by fine, she being covert. *Sed non allocatur*; for the estate of the lessee is not derived from the lessor's but arises out of the estate of the feoffees or releasees named in the original settlement, and therefore nothing more is requisite to the raising an estate to the lessee, but what is required by the deed which creates the power, which is only an indenture signed by the party making the lease, and made in such manner as the statute 32 H. 8. requires in leases by tenant in tail: and therefore it is held, that in leases for life made by virtue of a power no livery is needful, and it hath been doubted whether livery would not hurt; but HALE held it did not prejudice. 1 Vent. 281. And in the case of *Harris* and *Graham* as above, no fine appears.

Co. Litt.

373.

Vaugh. 383.

Dyer 48. b.

in margin.

Moor 8.

3 Com.

Dig. 239,

433.

Bac. abr.

317.

Cowp. 702.

Doug. 570,

573.

1 Term.

rep. 738.

See stat. 4,

Ann. c. 16,

sec. 21.

3d, That this lease will not continue in force against the lessor of the plaintiff who claims by virtue of remainder, for the lease is to be made under such conditions, rents and reservations, and in such manner and form to all intents and purposes, as tenant in tail may lawfully and is enabled to do by statute 32 H. 8. c. 28. but lease by tenant in tail is not good against him in reversion or remainder. Co. Lit. 44. a. b. 8 Co. 34. a. Cro. Eliz. 602. Noy 6.

And the Chief Baron doubted hereof; but it was argued, that if such construction be made, this power of leasing is wholly insignificant, for *Lucy* had but an estate for life, and therefore every lease beyond it must have continuance against the person in remainder, and a lease determinable on her own life that she might have made without the power; besides I took notice that the reasons why lease by tenant in tail stood not good against him in remainder, were because the lease is derived from the estate-tail, and it appears not that the statute meant to make it good against any but his issue, for the statute mentions not the donors. Dyer 48. in the margin. But the lease here is derived out of the fee-simple vested in the releasees and their heirs, by him that had the fee, and had power to model the uses of it as he pleased, and since the statute 27 H. 8. 10. executes the possession

possession to the use in the same manner and plight, [498]
as it is limited, whence such power of making leases, &c.
annexed to the estates for life becomes effectual, there is no
reason why such lease made by virtue of such a power,
should not stand good against those who claim in remainder
under the same settlement, and consequently subject to the
power; nor do the restrictions (annexed to the power,
which require it should be made under such conditions, rents,
&c. and in such manner as tenant in tail is enabled to
make) necessarily import that it should be such in point of
duration, but only that it should be attended with such cir-
cumstances as that act requires in the execution of leases
by tenant in tail.

Fox and Bardwell and others;

Case 213

Et eontra

Bardwell and others and Fox. In Scacc'.

BILL in Exchequer by Fox, as vicar of *Lakenham* in the
county of *Norfolk*, for the tithe of hay and all vicarial
tithes arising on lands in defendant's possession from 10 Oct.
1727, for the year following.

Unity of
possession of
a manor
and rectory
will not ex-
empt the
demesne
lands from
the pay-
ment of
tithes when
they come
to be se-
vered.

And the case upon the depositions appeared to be this:

In the time of William 2. the cathedral church of *Nor-
wich*, is supposed to be built, and the bishop's see removed
from *Thetford* thither.

In the time of Hen. 1. *Herbert* bishop of *Norwich*, grants
to the prior and convent of *Norwich*, *Ferias quas Rex Wil-
helmus* fratribus donavit in hebdomadâ pentecostis, &c.
Lakenham cum omnibus rebus quæ ad eandem pertinent
willam præter terram *Osberti* archidiaconi *Ameringhale*, me-
diætatem silvæ de *Thorp*, &c. But this seems rather a
confirmation of the grant of Hen. 1.

Anno 1121, *Everard* Bishop of *Norwich* confirms to them,
omniæ quæ prædecessores mei dederunt, &c. similiter quic-
quid *Herbert* de *Rofs* habuit in *Lakenham*, &c.

Anno 1146. *William* bishop of *Norwich* confirms to them
omniæ quæ *Herbertus* episcopus *Norvicensis*, aut *Everardus*
episcopus *Nervicensis* donavit, & quicquid *Herbert* de
Rofs habuit in *Lakenham*.

[499]

Anno 1200. *John de Grey* bishop of *Norwich*, grants to
the prior and convent of *Norwich*, ecclesiam de *Lakenham*
cum

De Term. Pasch. 8 Geo. 2.

cum omnibus ad eandem pertinentibus, &c. administrari per capellanos suos, salvo nobis & successoribus nostris jure pontificali & parochiali.

16 Hen. 3. Anno 1233. An *inspeximus* and confirmation of the grants of King William 2. and Hen. 1. wherein they grant manerium de Lakenham, Ameringhale, medietatem Silvæ de Thorp, &c.

Anno 1273. Confirmation by Pope Gregory to the monks of Norwich of a grant of the church of *Lakenham*, and by the valuation of ecclesiastical benefices, 20 Ed. 1. & 26 Hen. 8. it appears, that the cure was served by the monks, who received an annual pension.

By charter 30 H. 8. the King Cænobium de priore & conventu ecclesiæ cathedralis sanctæ Trinitatis Norwici transposuit & mutavit in decan' & capitulum ecclesiæ cathedralis sanctæ Trinitatis Norw'.

2 And. 120. And incorporates the dean and Chapter, and grants them all the possessions of the priory. Vide 3 Co. 73.

4 Inst. 257, The dean and chapter having by this grant the manor of
1 Jon. 166, *Lakenham*, and likewise the church of *Lakenham*, as being
167. part of the possession of the prior and convent, by lease
1 Co. 126, a. 2 Jan. 33 Hen. 8. 1541. demised to Robert Flint

Palm. 491. the scite of the manor of *Lakenham*, and all the lands be-
Winch. 38, longing, except the mills and woods, for — years, and co-
Lay 74. venanted, that the lessee shall have the tithes of his cattle
going on the said demesnes, and that the dean and chapter
will discharge him of all tenths, &c.

[500]

1 Mar. 1 Ed. 6. By indenture the dean and chapter, in consideration that Robert Flint had been at great charge in building and repairing the houses, demised to him *Lakenham*, (that is to say, the scite of the manor and demesne lands by the lease 33 H. 8.) which it is said hath been always freed from the payment of tithes predial and personal in the hands of the farmers; the meaning was, that he should hold the said manor of *Lakenham* discharged of all manner of such tithes; and by the same indenture the dean and chapter demised to him the tithes of hay and corn growing on the said demesnes for 29 years.

3 June 1 Ed. 6. the Dean and Chapter surrendered their possessions to the King, who by letters patent 9 Nov. 1 Ed. 6. grants to the dean and chapter, omnia illa maneria nostra de Hindlenoston, &c. 20 maneria in com' Norf', ac etiam omnes illas rectorias & ecclesias nostras de Hindlenoston &c. *Lakenham*, &c. 25 rectorias in com' Norf', &c.

Ac etiam

De Term. Pasch. 8 Geo. 2.

Ac etiam advocaciones, donationes, jura patronatus vicariam predictarum ecclesiarum & earum cujuscunque, necnon omnia & singula maneria, messuagia, &c. redditus, &c. glebas, decimas, oblationes, obventiones, pensiones, portiones, advocaciones, jura patronatus, proficua & hæreditamenta nostra quæcunque in villis, &c. de Hindlenoston, Newton, &c. Lakenham, &c. in com' Norf' &c. dictæ ecclesiæ cathedralis dudum spectant.

Except, tamen, & nobis, hæredibus & successoribus nostris reservat' maner' de Hemilby ac rectoriâ & advocacione vicariæ de Wykelwood in com' Norf', necnon omnibus & singulis messuagiis, terris, &c. decimis, redditibus & hæreditamentis in Hemingsby, Lakenham, &c. aut alibi dict' maner' de Hemilby, Lakenham, &c. ac rector' de Hemilby seu eorum alicui quoquomodo spectant, ac except' omnibus terris, &c. decimis jacentibus in Eaton, ac assignat' maner' de Lakenham extra dict' maner' de Eaton ac extra dict' maner' de Ameringhale ac modo in tenur' Roberti Flint.

By patent 1 July 7 Ed. 6. the King grants to *Tho. Gresham*, Esq. manerium de Lakenham, ac tot' rector' & ecclesiam de Lakenham ac advocacionem & jus patronatus vicariæ ecclesiæ ibi, &c. ac omnia & singula messuagia, grangias, &c. glebas, &c. decimas garbar', blador', granor' sœni & cannabi, ac al' decimas quascunque in Westacre, Lakenham, &c. dict' maner' et ecclesiæ seu eorum alicui spectant, &c.

[501]

It does not appear any vicar was instituted till the year 1610, but that since then *Smith* and others have been instituted vicars, and Sir *Nevil Catlin*, his father and grandfather held *Lakenham* farm as assignees of the lease made to —; that *Tuck*, *Wright*, *Ward*, *Armiger*, *Menser*, were tenants under the *Catlins* of the said farm; that the common reputation has been, that the vicars of *Lakenham* have been entitled to all the tithes of *Lakenham*, except the tithes of corn.

That tithes have been paid by the owners and occupiers of this farm to the vicars, or a composition for them, which was usually 8l. a year; that *Richard Catlin*, father of Sir *Nevil*, paid so in lieu of vicarial tithes to *Smith* the vicar; that *Tuck's* father held the farm several years, and paid so, that *Wright* for many years did the same; that *Ward* refused to pay, on which *Smith's* widow sued him in the Exchequer, and had a decree 9 W. 3. to pay tithes in kind, and

F f

being

being informed *Richard Catlin* had paid 40s. quarterly, on recommendation of the Court the plaintiff accepted 8l. a year, and *Ward* paid it for time past, and all time after he held the same farm.

That *Wright*, *Richard Catlin* and his father paid 50; that *Tuck* and his father paid 50; that *Armiger* and *Menfer* paid 50 six or seven years; that his father at first paid but 5 or 6l. a year, for two or three years, but hearing 8l. a year had been paid, agreed to pay 50, but only paid 5l. a year to *Harwood*, who was an easy man; and payments by *Tuck*, *Wright* and *Ward* were confirmed; books of *Richard Catlin* contain entries of his payment Anno 1632 and 1635.

[502] And two decrees for payment 9 W. 3. & Trin. 8 Geo. 1. were read, the last of which was against *Bardwell*, now defendant, and *Ward* his tenant, and *Reb. Ward* his wife saith, her husband paid 20l. for the tithes of the year 1720, and 22l. for the tithes of the year 1721, and by report in the last cause 15 April 1725, defendant was reported indebted 20l. for tithes of the year ———; and decreed to pay that sum and costs.

On the defendant's part they produced, beside the charters and grants above, a lease 14 Oct. 34 H. 8. from Dean and Chapter of *Norwich* to *Laurence Stisted* for fifty years, of the tithes of all corn belonging to the parsonage there, except the tithes of corn, hay, tack and hemp, belonging to the manor of *Lakenham*, wherein is recited a lease from the prior and convent of *Norwich* for twenty years to *Ro. Piſſoe*, dated 10 Nov. 27 H. 8.

This lease to *Stisted* was assigned to *Tho. Piſſoe*, and on his surrender by indenture 12 April 1 Eliz. the Dean and Chapter demised to *Piſſoe* the tithes of corn in *Lakenham* belonging to the parsonage there, except as before, for eighty years from Mich. last.

On surrender of this lease by indenture 20 Dec. 8 Eliz. the Dean and Chapter demised the same to *Edmund Dean*, who was assignee of ——— *Scrivens*, assignee of *Tho. Piſſoe*, for seventy three years.

By indenture 14 Feb. 12 Eliz. the Dean and Chapter on surrender of last lease demised to *Lane* for seventy years.

It appears *Lakenham* farm is part of the demesnes of the manor of *Lakenham*, and consists of thirty acres in *Lakenham*, twenty-eight acres in *Ameringhale*, the town close which lies in *Eaton*, and the rest lies in *St. Stephen's* parish; and

De Term. Pasch. 8 Geo. 2.

it was proved by ten witnesses, and several depositions in the former causes, that *Lakenham* farm was reputed tithe-free, and never any tithes in kind great or small paid for it; and *Wright* and *Ward* said, what they paid was only a free gift.

On this case it was insisted for the defendants, that *Lakenham* farm was exempt from payment of tithes by statute 31 H. 8. or secondly, by grant 7 Ed. 6. or at least the plaintiff cannot be intitled to recover any tithes as having b. no vicarage indowed. [503] Co. 49, a.

1. It was argued, that the manor of *Lakenham*, and likewise the rectory, having been granted to the prior and convent of *Norwich*, there was a unity of possession, which was a foundation for an exemption by statute 31 H. 8. but this was not so much insisted on; for although it was agreed, that where a perpetual unity continued to the time of dissolution, by force of the statute 31 H. 8. it was a good ground for exemption of those lands from tithes in the hands of the patentees; yet here was no proof that the priory of *Norwich* was one of the greater houses that came to the Crown 31 H. 8. and it was evident they were in the Crown before, and consequently by surrender, or by statute 27 H. 8. for by letters patent 2 May 30 H. 8. the King changes the prior and convent of *Norwich* into a dean and chapter, and transfers to the dean and chapter of *Norwich*, all the possessions of the priory.

Now no lands belonging to religious houses that were dissolved by 27 H. 8. were exempt from tithes; and unity of possession was not in itself any discharge for the tithes, being collateral to the land, as soon as the unity ceased, the right to tithes revived accordingly. It appears, that the dean and chapter of *Norwich* having the possessions of the priory, immediately made leases of the tithes. By indenture 2 Jan. 33 H. 8. they demised the manor of *Lakenham* to *Flint*, who in consequence was bound to pay tithes to the rector the lessor, and 14 Oct. 34 H. 8. they demised all the tithes of corn belonging to the rectory to *Law*. Stisted for fifty years, to commence after a prior lease of them by the prior and convent 10 Nov 27 H. 8. to *Robert Pistol* for twenty years; so it is plain they did not then look on the tithes to be extinct, or the manor of *Lakenham* to be exempt from them.

It is true, in the lease to *Flint* the dean and chapter covenant he should not pay tithes for his cattle agisted on the

[504] demesnes of the manor, which covenant shews that without it tithes might have been demanded for the agistment of his cattle. In the lease to him 1 Mar. 1 Ed. 6. it is declared indeed, that the manor of *Lakenham* had been always freed from tithes predial and personal in the hands of the farmers, and on that account it was explained he should not be charged for any such tithes, and the predial tithes of the demesnes are demised to him for 99 years.

But though this be insisted on as an argument that the demesnes were always discharged of tithes, yet if a construction be made according to the import of the words, it seems rather to infer the contrary: It is very likely the prior and convent, when they leased out any part of their lands, leased them free from the payment of tithes, in order to gain the higher rent, and therefore in the manor of *Lakenham*, or any part of the demesnes, they exempted them from paying any predial or personal tithes; but this was an exemption that was not inherent in the lands, but was the effect of their covenant to excuse them; when therefore the covenant in the lease 33 H. 8. excused only the tithes of the cattle agisted on the demesnes of the manor, that was not equivalent to what the former tenants were excused from, and therefore in the lease 1 Ed. 6. it was declared the meaning was to excuse him from all predial and personal tithes whatsoever; and therefore the predial tithes only were demised to *Flint* for 99 years, but all mixed tithes, with which the vicar is usually endowed, were still payable by him; the covenant to discharge all tithes, was meant only to exempt from the tenths payable by statute 26 H. 8. and not to excuse them from any other tithes.

2. But the thing mainly insisted on is, that by letters patent 7 Ed. 6. the King grants to *Thomas Gresham* the manor of *Lakenham*, ac totam rectoriam & ecclesiam de *Lakenham*, ac advocationem & jus patronatus vicaræ ecclesiæ ibidem, ac omnia messuagia, &c. glebas, decimas in *Westacre*, *Lakenham*, &c. dict' mane', ecclesiis seu eorum alicui spectan', &c.

[505] Whence it is inferred that the plaintiff, collated to the vicarage by the dean and chapter, can have no right to the tithes, at least not the tithes arising from the manor of *Lakenham*.

And although it was answered, that by the letters patent 1 Ed. 6. the King had granted the rectory of *Lakenham* and

and advowson of the vicarage to the dean and chapter, and consequently the subsequent grant to *Thomas Gresbam* is void; yet it was urged that in that grant there is an exception of all tithes in *Lakenham* to the manor of *Lakenham* belonging; as therefore the demesnes of *Lakenham* have always been reputed exempt from tithes, and it came to the Crown tithe-free, and those tithes by this charter are granted to *Thomas Gresbam*, the plaintiff cannot be intitled to them.

But it is evident by what is before said, that the manor of *Lakenham*, and other possessions of the prior and convent of *Norwich*, came not to the Crown by the statute 31 H. 8. but were in the Crown before, either by surrender of the prior and convent, or by the statute 27 H. 8. and consequently did not come to the Crown tithe-free; but in reality, although the manor of *Lakenham* and the rectory of *Lakenham* had been long united, upon the severance of them the right of tithes revived; when therefore King Ed. 6. in the first year of his reign granted to the dean and chapter of *Norwich* the rectory of *Lakenham*, all tithes in the parish of *Lakenham* became due to the dean and chapter, as well those out of the demesnes of the manor as elsewhere, and the exemption doth not extend to any tithes, parcel of that rectory; but first, the King having granted several manors, rectories and all other hereditaments in *Lakenham* or elsewhere in the county of *Norfolk*, which heretofore belonged to the cathedral church of *Norwich*, he excepts out of this grant the manor of *Lakenham*; but this amounted not to an exception of the rectory (if it had been appendant to the manor, as it was not) because the rectory was expressly granted away before: Then he excepts all tithes to the manors of *Hemilby*, *Lakenham* and rectory of *Hemilby*, *aut eorum alicui spectant*; but this doth not except the tithes of the demesnes of *Lakenham*, which were not belonging to the manor but to the rectory of *Lakenham*, for the tithes are collateral to the land; besides it doth not import any tithes belonging to the manor, for it comes in with general words *belonging to the manor or rectory of Hemilby or any of them*, so that it excepts not any tithes belonging to the manor, unless it otherwise appear there were any such: The next branch of the exception indeed seems to import that there were tithes belonging to the manor, since it excepts all tithes in *Eaton*, assigned to the manor of *Lakenham* out of the manor of *Eaton* and out of the manor of *Ameringhale*

ringhale, now in the tenure of *Robert Flint*; and it seems probable there might be some portion of tithes granted before the council of *Lateran* out of *Eaton* and *Ameringhale* and annexed to the manor of *Lakenham*, because in the lease to *Stiffed* 34 H. 8. of the tithe corn belonging to the parsonage of *Lakenham*, there is an exception of the tithe of corn, hay, tack and hemp belonging to the manor of *Lakenham*, which were probably excepted out of *Stiffed's* lease, because they were before demised to *Flint*; and perhaps by the leases of the site of the manor of *Lakenham* 33 H. 8. and 1 Ed. 6. and the demesne lands, they might be thought to be comprehended in the general words, but whether they were in the tenure of *Flint* by those leases or any other, the exception of the tithes lying in *Eaton*, & *assignat' & appunctuat' manerio de Lakenham extra maner' de Eaton & maner' de Ameringhale*, cannot except the tithes arising out of the demesnes of *Lakenham*, and belonging to the rectory of *Lakenham*.

And if those tithes be not excepted out of the grant 1 Ed. 6. they cannot pass to *Thomas Gresham* by the grant 7 Ed. 6. they cannot pass as part of the rectory, being granted 1 Ed. 6. to the dean and chapter, could not pass by the grant, 7 Ed. 6. for the King was deceived, and his grant to *Thomas Gresham* as to the rectory of *Lakenham*, and the advowson of the vicarage, and the tithes belonging to the church of *Lakenham*, is void; it may possibly stand good as to any tithes in *Eaton*, or assigned out of the manors of *Eaton* or *Ameringhale* to that of *Lakenham*.

[507]

I need not cite cases to shew that an exception doth not extend to exclude out of a grant what is expressly granted. 2 Roll. 454. S. 8. A man seised of the manors of C. and D. of which *Blackacre* is a part of the manor of C. but lies near D. and is enjoyed with and reputed parcel of D. he grants the manor of D. and all lands reputed parcel of it, except the manor of C. *Blackacre* is not excepted, being expressly granted as parcel of the manor of D. under the words *all lands reputed parcel of that manor*.

Suppose King Ed. 6. had granted to *Thomas Gresham* the manor of *Lakenham*, the rectory of W. and all lands, tithes, &c. to the said manor and church or either of them belonging, and after had granted the rectory of *Lakenham*, *cum omnibus juribus, membris & pertin' diē ecclesiæ Cath' dudum spectan'*; I apprehend the tithes of demesnes of the manor belonging to the rectory would not have passed to *Gresham*;

it would be like the case Mo. 426. where the abbot of *Abingdon* seized of the hundred of H. and the leet belonging, and other lands which came to the Crown on the dissolution, the King grants to one *Lions* part of those lands, and all leets *infra præmissa*, and after grants the hundred of H. and leet belonging, to Lord *Norris*; it was held the leet passed by the last, not by the first grant.

Thirdly, But in the last place it is said that here was never any vicarage endowed, for the cure was supplied by the monks who had a salary allowed them, and consequently the plaintiff cannot recover, for the vicar cannot be entitled to tithes unless endowed of them, and the endowment must be proved by an endowment produced, or else by prescription; but here is not any endowment produced, and can be no prescription, because it was shewn when there was none, for no pretence of any vicar, or tithes paid to him till the year 1610.

But it was answered, it may be difficult always to shew the exact time when a vicarage first commenced, or when it was first endowed.

[508]

By the constitution of *Ottoboni* 21 Apr. 52 H. 3. *Universi Religiosi, qui ecclesias in proprias usus habent, si vicarii non sunt positi in eisdem infra sex mensium spatium, vicarios diæcesini præsentare non omittant, quibus sufficienter pro facultata ecclesiarum assignent portionem, alioquin diæcesani id facere studeant.*

Therefore though the church of *Lakenham* was appropriate before the statutes 15 R. 2. and 4 H. 4. 12. which require that on appropriations care be taken there should be a vicarage endowed, or otherwise the appropriation shall be void; and it was insisted that those statutes extend only to the time future, and consequently on this appropriation there might be no endowment of a vicar; and it is most probable it was not, because the monks supplied the cure till the dissolution, and had no tithes, but an annual pension; yet it appears by this constitution the religious were obliged to create a vicar and endow him, otherwise the bishop was required to do so; and this construction extends to all precedent appropriations, and therefore the presumption is, that there was a vicar endowed pursuant to this construction.

How the cure came after to be supplied by their own monks does not appear; perhaps those monks might be presented and instituted, though they are called *Cappellani*;
or

or perhaps the Pope might by bull allow the prior to appoint one of his monks to officiate and serve the cure, as in the case of *Briton and Wade*, 2 Cro. 515.

[509] The prior of *Deintree* had the advowson of *Norton* appropriate, and the vicarage was endowed with the altarage and small tithes, and so continued till the reign of H. 6. when on petition of the prior to the Pope, in regard the priory was poor, the Pope granted *quod de cætera* the prior should constitute one of his monks to officiate in the cure, and so it continued to the dissolution; but held this did not dissolve the vicarage.

It is true, this was an endowment after the statute 4 H. 4. but though this was a reason given, that the Pope could not dissolve a vicarage after that statute.

Yet it was resolved, that it could not be done by the Pope, though the ordinary might do it.

It is sure the vicarage of *Lakenham* is mentioned in the patents 1 Ed. 6. and Ed. 6. so that the church was looked upon to have a vicarage then.

And though it does not appear how the endowment originally was, it is sure they were oftentimes uncertain and variable.

At first the endowment might be small, and after enlarged. *Seld. of Tithes* 3 Vol. 1262, saith, speaking of the first appropriations.

Not was there any perpetual certainty of the profits of their presentee (that is the person, the appropriate person presented to any vicarage) till the monks by composition with the ordinary, or by their own ordinance, (which prescription after confirmed) appointed some yearly salary in tithes or glebe, or rent, for the perpetual maintenance of the cure; which salaries became afterwards the endowments of perpetual vicarages.

Crimes & al v. Smith, 12 Co. 4. in the Exchequer. The case was, The abbot of *Salby* held the parsonage of *Lubenham* in the county of *Leicester* as appropriate, which came to the Crown by stat. 31 Hen. 8. who in the thirty-seventh year of his reign granted it in fee farm, under which the plaintiff claimed; the defendant got a presentation from *Queen Elizabeth* to this church, and insisted, that the impropriation was made 22 Ed. 4. and no endowment of a vicarage, and consequently the appropriation void; and there was no instrument or direct proof of any endowment. But since, during the appropriation supposed, there had

Watf. Cler.
Law, 194,
391 392,
Sec.
2 Co. 47.
Runb. 72, 87,
169, 170.

[510]

De Term. Pasch. 8 Geo. 2.

had been a vicar inducted, as a vicar rightfully endowed, it was resolved by the Court, that the vicarage, in respect of its continuance, was rightfully endowed.

And the Court said, it would be dangerous to examine into the original of impropriations of parsonages and endowments of vicarages. Watf. 195.
2Cro. 252.
Post. 5.

In the present case there is a proof of payment of vicarial tithes to the vicar for near 100 years, while *Richard Catlin, Tuck, Wright, Ward, Armiger, Menfer*, held this farm, and a constant reputation, that all tithes but of corn belonged to the plaintiff; and two decrees of this Court in his favour, which raises a strong presumption for him.

It is possible the endowment at first was but small; that some pension was paid to the incumbent; that when the dean and Chapter had the parsonage, they might vary or augment the endowment of the vicarage in *Flint's* lease 33 H. 8. the demise of predial and personal tithes only, looks like a reservation of the rest for the vicar; and the prescription, which is evidence of an endowment, need not be such as admits no proof when it was not paid; for the endowment may be within time of memory; but a prescription allowed by the canon law of sixty years or thereabouts, a time sufficient to induce a belief that there was some foundation for the payment, though it does not appear exactly when such payment began.

Besides, there was on 6 Nov. 1735, to which the debate of the cause had been put over, further evidence given of several presentations by the Dean and Chapter to the vicarage, and the vicars instituted thereon, some of which were said to be in pursuance of the constitution of *Ottoboni*.

The first institution was 1312, which were followed by others 1327, 1359, 1361, 1375, 1386.

Anno 1569, there was a sequestration granted of the profits of the vicarage by the bishop, in order to supply the cure in the vacancy, and anno 1610 there was a presentation again.

Besides, there were produced accounts of the chamberlains or treasurers of the priory in the time of R. 2. and H. 6. wherein he accounts for 5s. de terris pertinē vicario de Lakenham, 4l. 4s. 3. de ecclesia de Lakenham, 14l. de manerio cum decimis, & 19 R. 2. de manerio 20l. de decimis 4l.

It was further proved, that the reputation was, that the vicar had tithe-hay as well as other vicarial tithes, and that the

[511]

De Term. Pasch. 8 Geo. 2.

the payment of the 8l. yearly by *Catlin, Wright, &c.* was reckoned to be for the tithe of hay, clover, turnips, and all other small tithes, and that tithe had been once paid in kind to the vicar.

It was further insisted, that the vicarage or rectory of *Lakenham* came not to the Crown either by the statute 31 H. 8. or 27 H. 8. but the King 30 H. 8. translated the priory and convent to a dean and chapter, and transferred the possessions of the priory to the dean and chapter; so that these possessions not being surrendered to the Crown, nor vested, in the Crown by any act of parliament, there could not be any exemption from tithes; for unity of possession cannot be an exemption longer than the unity continues, and it is only by force of penning the clause in stat. 31 H. 8. that the lands given to the Crown by that statute are discharged, where there had been a perpetual unity till the dissolution by that statute.

11 Co. 14.
b. 15, a.

See Bunb.
Rep. 26.
37, 38, 66,
122, 338.
159, 209,
214, 296.
3 Bur. 1375,
to 1379.

{ 512 }

2 Bl. Com.
28 to 32.

2 Ld. Ray.
991.

1 Ld. Ray.
137

2 Salk. 655.
See Farsell.

113, 137.
1 Saund.

141, 142.
Carth. 392.

Comb. 403.
Skin. 560.

Holt 671.
Cas. B. R.

117.
March. 26.

1 Ro. abr.
653.

Litt. Rep.
152, 153.

4 Mod. 336,
b. 341.

Lutw. 1316.

And the Court was of opinion, that unity of possession of the manor and rectory of *Lakenham* in the hands of the prior and convent, and after of the dean and chapter of *Norwich* till 1 Ed. 6. did not exempt the demesnes of the manor from tithes when they come to be severed.

That by the letters patent 9 Nov. 1 Ed. 6. the rectory was granted to the dean and chapter of *Norwich*, and consequently the grant of it by the patent 7 Ed. 6. to *Thomas Gresham*, Esq. was void; and although there was an exception in the grant 1 Ed. 6. of the manor of *Lakenham*, rectory of *Hemilby*, &c. and all lands, tithes, &c. 'to the said manors, rectory, *aut eorum alicui quomodo spectant*,' that did not except any tithes, parcel of the rectory of *Lakenham* which was before expressly granted to the dean and chapter, much less the tithes belonging to the vicarage.

That the reputation of tithe hay and all vicarial tithes belonging to the vicar, and the payment of them by the rest of the parish, and the payment of the 8l. yearly, or some other sum, as a composition for them by the owners and occupiers of *Lakenham* farm above 100 years, and the two former decrees in favour of the vicar, was a sufficient evidence of some ancient endowment.

And the Court decreed the defendant should account with the plaintiff for the tithes demanded by the bill, and that the defendant's cross bill should be dismissed with costs, which upon an appeal to the House of Lords in March 1735-6 was affirmed, with 200l. costs.

Termino Pasch.

[513]

9 Geo. 2.

Roger Acherley *ver.* Bowater Vernon.

Case 214

IN ACTION OF DEBT for 5700l. the plaintiff declares, That whereas *Tho. Vernon*, Esq. being seised in fee, by will 17 June 1711, devised to his wife out of the manor of *Shrawley*, and other lands and tenements in the county of *Worcester*, an annuity or rent-charge of 1000l. a year for her life, clear of all charges, except parliamentary taxes, in lieu of her jointure.

The non-performance of a condition, tho' subsequent, sufficient to bar the plaintiff's title to whatever he claimed upon such condition. See Ante 381.

And by the same will devised to his sister *Eliz. Acherley*, the plaintiff's wife 200l. a year out of rents of his said real estate, to her own hands for her separate use, exclusive of her present or any future husband; and to be made up 400l. a year from his wife's decease, during his sister's life.

And after a devise of other estates to *William Vernon*, &c. he devised all the residue of his real and personal estate, (his debts, legacies and funeral expences first paid) unto his brother *Roger Acherley*, *Geo. Vernon*, *Geo. Wheeler*, *John Bearcroft*, and *Richard Vernon*, their heirs, executors and administrators, upon trust and confidence, that after the annuities and annual rents before devised to his wife and sister, &c. paid, the said trustees should invest the residue of his personal estate in the purchase of lands, &c. and should stand seised of all his real and personal estate, during his wife's life, to the uses and purposes in the said will; and after the decease of his wife (in case he die without issue then living) should stand seised of all his manors, messuages, lands, tenements and hereditaments, and lands to be purchased with the surplus of the personal estate, and should settle the same to the use of *Bowater Vernon* for ninety-nine years, if he so long live, with remainders over, &c.

[514]

And

De Term. Pasch. 9 Geo. 2.

And directed, that his trustees during his wife's life should pay the clear surplus of the profits of his real and personal estate, after payment of the said annuities, debts, &c. to the said *Bowater Vernon* for so long a time as he should live, and after his decease, to his first and other sons in tail male, &c.

And whereas by codicil 2 Feb. 1720, *Thomas Vernon* the testator having purchased other lands, devised the same to his trustees and executors, subject to the same trusts or same uses to which he had devised the bulk of his estate, &c.

Then revoking that part of the will that appoints *Roger Acherly*, *George* and *Edward Vernon* three of his trustees, he desires *Frances Keck* and *John Nichols* to be two of his trustees.

And whereas the testator died 5 Feb. 1720. seised, &c. after whose death *Roger Acherley* and *Elizabeth* his wife were seised of the said rent devised to *Elizabeth* in demesne as of freehold, in right of the said *Elizabeth*, by virtue of the said devise. And *Bowater Vernon* entered into the said manor, &c. out of which, &c. and hath been ever since tenant of the demesne thereof, and 1900l. for nine years and a half, ended 5 Feb. 1731. in the life of the said *Elizabeth Acherley* and *Mary Vernon*, became due to the said *Elizabeth* for the said yearly rent, and is yet unpaid.

[515] And the said *Elizabeth* died 3 May 1732, and *Mary Vernon* died 5 July 1733, whereby, and by death of *Elizabeth*, and by force of statute, action accrues to the plaintiff, her husband, to demand the said 1900l. part of the said 5700l.

In the second count plaintiff declares, that whereas *Thomas Vernon* being seised in fee of the manor of *Shrawley*, &c. by will 17 Jan. 1711, devised to *Elizabeth* wife of plaintiff, 200l. a year to be issuing out of his real estate, &c. for life, and died 5 Feb. 1720, after whose death plaintiff and wife, in right of wife, were seised of the said yearly rent, and *Bowater Vernon* entered into the said manor, and hath ever since been tenant of demesne, and 1900l. for nine years and a half's rent ended 5 Feb. 1731, became due to the said *Elizabeth*, in her life and life of *Mary Vernon*, and then *Elizabeth* died 3 May 1732, whereby, by force of statute, plaintiff became intitled to demand the said 1900l. other part of the said 5700l.

Third count to the same effect, on devise by codicil 2 Feb. 1720; to which the defendant pleads he owes nothing.

And

De Term. Pasch. 9 Geo 2.

And on trial at the sittings 24 Feb. 8 Geo. 2. before Chief Justice EYRE, agreed to a verdict for the plaintiff on the first count, and rest for defendant.

And the plaintiff shall insert into the declaration the condition in the codicil devised to *Letitia A.* and whatever in will or codicil defendant thinks necessary, and if the Court be of opinion for the defendant the plaintiff shall pay costs of a nonsuit.

Serjeant SKINNER for the defendant.

The case principally intended to be referred to the consideration of the Court is this:—

Thomas Vernon devises 200l. rent-charge to his sister, wife of the plaintiff, for her life for her separate use, to be issuing out of his real estate, and devises his real estate to trustees, on trust that the rent-charge being first paid, after his debts and legacies satisfied, they should stand seised, during his wife's life, to the uses of his will, and to enable them to perform it; and directed them during his wife's life, to pay the clear surplus of the profits, after the said annuities, debts, legacies, &c. deducted, to defendant so long as he lives, then to his sons, &c. and after the death of the wife to stand seised, and to settle the same on the defendant, &c. the defendant enters on death of the testator, and hath ever since received the profits as tenant; the plaintiff's wife dies. Whether the plaintiff can maintain debt against the defendant for the arrears of this rent-charge during the coverture.

[516]

By statute 32 H. 8. 37. If any in right of his wife hath an estate for life in any rent, and the same be unpaid in the wife's life-time, the husband after her death shall have debt against the tenant of the demesne that ought to have paid the same.

2dly, It was insisted, that by the codicil it is said, But my will is, That what I have so given to my sister and niece be accepted in lieu of all, either might claim out of my real and personal estate, and upon condition that they release all right, &c. to my executors and trustees of my will.

This clause makes the release a condition precedent, and it is agreed by the case,

That the right is not released.

That the condition precedent must be shewn to be performed, or nothing vests, appears by the cases that are mentioned

1 Rol. ab.
914.
1 Jones 327.
Cro. Car,
335.

De Term. Pasch. 9 Geo. 2.

[517] mentioned. 1 Rol. Abr. 415. S. 11. Pl. Com. 30. 2 Vern. 340. 1 Saund. 215.

And this must be a condition precedent as to the legacy to the niece; and shall the same words make condition precedent to the niece and not to the sister?

Serjeant EYRE, *contra*, The words of the codicil must be taken distributively. 2 Vern. 478.

Cro. El. 636, 914. 1 Leon. 229. 1 Rol. ab. 415. 3 Lev. 132. 8 Co. 91. a. 2 Ld. Ray. 765. Doug. 63, 689. 1 Term. Rep. 645.

Whether a condition be precedent or subsequent, must be collected from the intent of the testator, to be collected from the words of the will. Win. 114. Cro. Eliz. 219.

Now here the devise of the annuities precedes the devise of the real estate.

But if the will and codicil be connected together, still the annuity to the testator's sister is devised first on condition; it is said the words make it a condition precedent, as to release from the niece; but I submit it was subsequent to the niece, for it is taken notice of, that the niece was under age at this time.

It is not to be understood he meant void releases to be made, he knew his sister was married, and niece under age, and neither the testator knew could then release.

Besides the testator saith my will is, *That the annuity so given be accepted, &c.* then adds, *having thus provided for my sister and niece, &c.* which shews he looked on the provision made at present before any release.

In case it be a subsequent release, it is then become impossible by the act of God, by death of wife during coverture, and consequently non-performance cannot avoid the annuity.

12 Mod. 455, 460.

Serjeant SKINNER in reply, This must be a condition precedent, as it is annexed to an annuity which is executory, and consequently must cease if not released.

Afterwards in Trin. 9 & 10 Geo. 2. it was argued by Serjeant CHAPPLE for the defendant, who insisted,

[518] 12 Mod. 435, 460.

First, That the annuity was given by the testator to his sister on a condition precedent, which is not averred to be performed.

Secondly, If not, yet the annuity ceased by non-performance of the condition.

As to the first, It appears the 200l. a year was not given absolutely, but upon a condition, and if she had no estate in her, the plaintiff, as her husband, cannot by statute 32 H. 8. 37, maintain action for the arrears.

Now

De Term. Pasch. 9 Geo. 2.

Now the words require something to be done previous, the words in the present tense, he accepted on condition she do release, not if she shall accept or shall release.

There is a difference between a devise of land and of annuity that is executory. 7 Co. 10.

The intention of the testator must be the rule to construe the words, and if the testator had been asked when she should have the annuity, he would have said when she released her right.

No part of the annuity can be paid till six months end, for it is payable half-yearly. Co. Lit. 208. 2 Co. 79. Where a condition concerns a transitory act, without limiting a convenient time, it must be done presently, that is, in convenient time, considering the nature of the transaction.

Now, if she takes the annuity, and after refuses to release, she hath the annuity, though the testator intended it in lieu and satisfaction of her claim to the estate.

Being a married woman will not alter the case, for if it do not vest till the act done, she might have levied a fine. 10 Co. Ow. 25. shews doing all she could do, had been a good performance; if she had levied a fine, though the husband had dissented, it might possibly have been good. Lat. 20.

Marriage, infancy, &c. no excuse. 1 Roll. Abr. 421. [519] 1 Vent. 199. 1 Rol. 444, 426.

If she had executed a release, it had shewn her willingness to do all she could, though not effectual. 1 Saund. 115.

Pasch. 1730, bill in Chancery, by Mrs. Acherley against trustees and plaintiff for this very annuity; decreed, on executing a fine, the arrears should be paid to her.

In Jan. 1733, Grangier, as administrator to his wife, exhibited a bill for the arrears of this annuity.

But 16 May 1734, by master of the rolls bill dismissed, because not alledged they had released.

Serjeant WRIGHT, *contra*, What has been done in Chancery is no more than that Court would not preclude remedy at law, unless they would comply with what was reasonably to be done on their part.

But here is no condition at all by the will; then the words in the codicil are *What is so given be accepted, &c.* then supposes it was given.

Besides the 200l. was not to be in lieu of her right, but the 400l. a year, and then it was to be released.

So

So the 1000l. made up 6000l. to the niece was not to be in satisfaction of her right, nor was she bound to release on payment of 100l. till the 6000l. paid.

Then the release could not be required till the whole benefit of the devise took effect.

Objected, She should have done what she could.

Answered, What she could not lawfully do, she was not bound to do.

[520] But this must be a condition subsequent; he designed his sister an immediate and present maintenance prior to any estate given to others.

Secondly, She was to release to trustees, who had no estate but what was subsequent to hers.

The case 1 Roll. Abr. 413, 16 S. 12. the condition 3 Lev. 132. was held subsequent, because to be performed at a day future.

Objected, Difference between devise of land and annuity that is executory. But no difference but where the condition is executory.

Thirdly, If condition be subsequent, it is become impossible by act of God, the sister dying before the wife.

In this case I think the devise of 200l. a year is not upon a condition precedent, if it had stood upon the words of the will, it is evident it was intended to be given to her immediately upon his death, for it was to be paid to her half-yearly, during her life, and exclusive of her present husband, as well as any future husband, and when she survived his wife it was to be 400l. a year.

Then he devises his estate at *Hertington* in *Lincolnshire*, paying out of it 100l. a year to his trustees during his wife's life, the better to enable them to pay the said annuities.

Then he gives all the rest of his real and personal estate, after payment of his debts, legacies and funeral expences, to his trustees, &c. on trust to pay the annuities before devised to his wife and sister first, and after payment of all debts, &c. to lay out the residue in a purchase, &c. And that the trustees should pay the said clear surplus after the said annuities, &c. to the said *Bowater Vernon*.

[521] So that upon the will the annuity to his sister undoubtedly vested presently, without any condition precedent.

Then by his codicil he first ratifies his will, except in the alterations after-mentioned, and then makes his niece's legacy 6000l. which before was but one; and then adds the proviso insisted on,

But

De Term. Pasch. 9 Geo. 2.

But my will is, That what I have so given to my sister and niece be by them accepted and taken in lieu of all they may claim out of my real and personal estate, and on condition they release all such right to the executors and trustees of his will.

Now the words of this proviso do import the bequests to his wife and niece to be antecedent to what is required to be done by the proviso.

That which is required to be done is, that the gifts be accepted in lieu of all they claim out of his real and personal estate, and on condition they release such right to his executors and trustees; it must be given before it can be accepted, and the acceptance must precede the release.

So that in this case the release cannot be prior to the devisees acceptance of it in lieu of all other interests they may claim out of the estate.

Secondly, The devise is by the will, this proviso by codicil annexed to the will; so that the proviso did not intend to defeat the will, but to add a condition to the devise thereby made; and therefore the wording of the codicil is, *What I have so given*; which imports, that the legacies were already given to which this condition is annexed.

It is objected indeed, that with respect to the niece the release must be antecedent.

But I do not see any necessity for such construction, the legacy of 1000l. is made up 6000l. by the codicil; no doubt she will accept the 6000l. rather than the 1000l. but such release may be subsequent. [522]

I see nothing in the nature of the thing, why this should not be made after as well as before.

But the legacy given to the niece of 1000l. by the will is to be paid at the age of eighteen, or marriage, and this is confirmed by the codicil, in case she release her right to the estate.

But she could not release till the age of twenty-one, and consequently her legacy was payable before she could release.

The condition therefore that she should release must be subsequent to the legacy devised.

And if it be subsequent as to the niece, the same words will not make a condition precedent as to one, and subsequent as to the other.

Chief Justice REEVE thought it a condition subsequent.

But the other judges doubting, it was adjourned; and afterwards in Easter Term 12 Geo. 2. WILLES Chief Justice

De Term. Pasch. 9 Geo. 2.

and the whole court inclined to think it a condition precedent; but held, that supposing it to be a condition subsequent, yet not being performed, the plaintiff was not intitled to the arrear of the annuity; and therefore the verdict was set aside, and the plaintiff to pay the costs of a nonsuit.

Case 215 *Bluet, qui tam, &c. ver. Needs.* In C. B. Entered Trin. 7 & 8 Geo. 2.

Conviction
of person
unqualified
incl. penalty for
every hare,
[523]
when held
good.

BLUET Clerk, *qui tam pro pauperibus quam pro se ipso*, exhibits his bill 23 Jan. in Hillary Term last against the defendant an attorney of this court, for 40l. debt, for that at *Holcomb Regis* in the county of *Devon*, 28 Nov. 1733, the defendant did use a gun to kill and destroy the game, whereas he was not qualified so to do by the laws of the realm; whereby an action accrued to the plaintiff to demand 5l. part of the said 40l.

Secondly, That 16 Jan. 1733, he did keep another gun to kill and destroy the game, not qualified, &c. for which action accrued for other 5l.

Thirdly, That the same day he exposed to sale six hares against the form of the statute, whereas he was not qualified in his own right to kill game; whereby action accrued to demand 30l. residue of the 40l.

Defendant pleads he owes nothing; and in arrest of judgment moved,

First, That the first count is not good; since by statute 5 Ann. 14. §. 4. it is enacted, That if any person, not qualified by the laws of this realm so to do, shall keep or use any grey-hounds, setting dogs, hays, lurchers, tunnels, or any other engine to kill and destroy the game, and shall be convicted, &c. before a justice of peace, he shall forfeit 5l.

But a gun is not mentioned in this act, and therefore when by statute 8 Geo. ca. 19. it is enacted, That persons liable to be proceeded against before a justice of peace for any pecuniary penalty or sum for any offence against the law for preservation of game, may be proceeded against by information before a justice of peace, or by action of debt, in case, &c. before the end of next term after offence, &c.

De Term. Pasch. 9 Geo. 2.

Debt lies not unless the offence be within the statute 5 Annæ 14.

Secondly, It is not sufficient to say he was not qualified, without shewing he had not 100l. a year, nor other estate which makes a qualification.

The Queen ver. George, in the Queen's Bench, 2 Ann. Mod. Caf. It was held, that conviction on statute 4 & 5 W. & M. 23. ^{40.} shewing that defendant *existens persona dissoluta*, &c. did hunt and kill so many hares, &c. ought to be quashed, because it did not shew he was not qualified. [524]

Thirdly, The selling six hares together is but one offence; and by statute 9 Ann. 25. which enacts, That if any person whatsoever, not being qualified in his own right to kill game, shall sell or expose to sale any hare, pheasant, &c. he shall forfeit for every offence such penalty as on Higlars, &c. by statute 5 Ann. 14. is inflicted, (viz.) the sum of 5l. which ought not to be understood 5l. for every hare, pheasant, &c. but for all sold at once; but the penalty on Higlars, &c. by 5 Ann. 14. is the sum of 5l. for every hare, pheasant, &c.

As to the first objection, a gun is an engine to destroy the game.

So as to the second objection, we have exactly pursued the words of the act; and if the defendant had been qualified, he must shew it. Dy. 312. Carth. 6, 124, 304.

As to the third objection, that all is one offence, the statute 9 Geo. refers to the statute 5 Annæ, which gives 5l. for every hare, &c.

And though it be objected now at last, that the jury finds but 10l. without shewing to which of the offences it is to be applied; it is to be observed, that this is an action of debt for 40l. and the several offences after mentioned make up that sum; and the jury may find the defendant owes but part of the debt.

And *per cur'*, As to the first objection, the averment of his not being qualified is sufficient, since the words of the act are pursued; and the defendant may come and shew his qualification. [525]

Indeed convictions have been quashed for not setting forth what was his want of qualification; because it must be made out before the justice, that he had no such qualification as the law requires; and therefore the justice ought to return, that he had no manner of qualification, before he can convict the defendant.

De Term. Pasch. 9 Geo. 2.

As to the second, this is after verdict; and it is matter of evidence, whether a gun be an engine to kill and destroy game.

As to the third, the statute 9 Geo. saith not he shall for every offence pay 5l. but shall forfeit the penalty of the statute 5 Ann. on Higlars, &c. which is 5l. for every hare, &c.

And being a debt, the jury may find part of the debt. Judgment for the plaintiff.

Case 216

Philips *ver.* Fowler. In C. B.

Verdict set
aside wh
the jury
cast lots,
how they
should give
it.
So where
they tossed
up. 1 Str.
642. 1
Term Rep.
11. 2 Jones
83.

IT was moved for a new trial, because the jury being divided cast lots, which falling in favour of the plaintiff, verdict was given for him.

If the jury cast lots how they shall give their verdict, and give it as the lot determines, the verdict shall be set aside. Resolved 2 Lev. 139.

After motion in arrest of judgment, on an information in nature of a *quo warranto*, for fishing in the river *Thames*, *The King* against *Ld. Fitzwalter*, (this was before *Hale* in the king's bench) Tr. 27 Car. 2. Verdict set aside for the same cause. 2 Lev. 205. *Foster* and *Hooden*, M. 29 Car. 2.

[526] So in the case of *Fry* and *Hordy*, 2 Jon. 82.

N v 49. 2
Bull. 17.
Vough. 152.
1 Roll. abr.
219 2 Hale
309. Dyer
78. 1 Bur.
274. 1 Str.
642. 1 Tem.
Rep. B. R.
11.

So where jury consented to join in verdict if the court approved of it, was set aside. Cro. Eliz. 779.

In the case of *Prior* and *Powers*, 3 Keb. 811. Mich. 16 Car. 2. it is said a new trial was denied for this complaint, but it was because the matter appeared only by pumping the jurymen to swear against himself; and *Twisden* said it would be of ill consequence; and that in *Sir Philip Alton's* case a new trial had been granted for throwing crosses or pile.

Serjeant CHAPPLE, *contra*, insisted, That it had been admitted by the motion in arrest of judgment, that the verdict was good, and therefore defendant cannot have liberty after to move to set it aside; in pleading, if the defendant omit to plead in due order, he loses the benefit of the former. Co. Lit. 303.

And a man cannot plead to a *scire facias* matter which avoids or abates the writ.

In the case of *The King* against *Lord Fitzwalter*, though

De Term. Pasch. 9 Geo. 2.

it is said to be a motion in arrest of judgment, the motion was only for a new *venire*, &c. 1 Keb. 465, 535.

It is said 2 Salk. 647. none shall move for a new trial after motion in arrest of judgment.

Nor after motion in arrest of judgment he cannot move to set aside a writ of inquiry.

After writ of error brought, you cannot move to set aside the judgment for irregularity. 2 Salk. 402.

Skin. 681.
Hlt 9 1
Salk. 13.
Comb. 459.
Carth. 425.
Cases. B.R.
151.

Serjeant EYRE to the same effect.

In reply, Serjeant SKINNER, HAWKINS and WRIGHT insisted, That this motion is not to set aside the verdict for an irregularity, or being against evidence; but because it is against justice, against the nature of a trial by jury, against *magna charta*, which saith trials shall be *per judicium parium suorum*.

[527]

It is admitted the motion is not too late to punish the jury; shall it then be too late to prevent the ruin of the defendant by this verdict, for which they are punished?

In case judgment had been entered on discovery that it was illegally obtained, it has been vacated. 1 Lev. 95. Mo. 631. 2 Rol. Abr. 1 And. 232. Verdict held to be void, because the jury examined witnesses apart.

CHIEF JUSTICE, it is generally true, that after motion in arrest of judgment, a matter known to the party, shall not be insisted on to have a new trial.

But no instance where in a case like this the verdict was allowed, because there had been a motion before in arrest of judgment; this therefore being a verdict contrary to *magna charta*, to the duty of a jury, against reason and right, I think there ought to be a new trial; the case *The King* against *Lord Fitzwalter*, is a resolution express in the point.

2 Lev. 139.

Judge DENTON and I were of the same opinion; Judge FORTESCUE doubted, he said he could not take it to be as no verdict since the *Postea* had returned it as such, but he agreed it ought to be a void verdict; and it was set aside.

Castell Attorney *ver.* Bailey. In C. B. Intr. Pasch. 8 Geo. 2.

[528]
Case 217

ACTION for words, for that the defendant 1 May 1734 falsely and maliciously spoke of the plaintiff, *He* (meaning *Where a verdict hath found words spoken of*)

De Term. Pasch. 9 Geo. 2.

the plaintiff (meaning plaintiff) is perjured and forsworn, and I can prove it.

Secondly, My brother Castell (meaning plaintiff) is perjured and forsworn, and I will prove the same.

Thirdly, My brother John (meaning plaintiff) is perjured and forsworn, and I can prove it, to the damage of 5000l.

Defendant pleads Not guilty; verdict for the plaintiff, and damages given generally.

Serjeant CHAPPLE moved in arrest of judgment because of intire damages, and on the 2d and 3d counts the action is not maintainable because no averment that defendant was brother to plaintiff, and then no evidence that those words were spoke of plaintiff.

And it hath been laid down as a rule, that where the words spoken may be applicable to several, it is not sufficient to say the words were spoken of the plaintiff; but there ought to be an express averment, that the plaintiff hath the title or description given him.

In the case of *Delamore* 11 Car. King's Bench. 1 Rol. Ab. 84. S. 2. 774. 2 Cro. 442. Error was of a judgment in the court at Bath, wherein the plaintiff declared, that in a suit there between defendant and S. the plaintiff was witness, and in discourse of such trial with the wife of S. and the oath the plaintiff had taken, the defendant said of the plaintiff, *Your brother Delamore (innuendo the plaintiff exist' fratrem dict' uxor')* took a false oath against me in the Hall, &c.

[529]

After verdict for plaintiff, the declaration was held not to be good, because not averred the plaintiff was brother to the wife of S. indeed the report adds *quære rationem* — for there was another cause of the judgment, because no averment that issue was joined, but only, that at a trial he was witness, and swore, &c.

1 Rol. 84.
Sec. 4.

So Mich. 15 Car. in the king's bench, *Johnson* and *Dy*, plaintiff declares that the defendant having discourse of the plaintiff, said of him to *John Johnson*, sen, *I will take my oath that you stole my hens*; judgment was arrested because no averment that the plaintiff was his son; but Mar. 62. takes notice *Croke* was absent. Vide Pal. 521. 2 Cro. 635.

1 Rol. 85.
Sec. 9.

So Hil. 1652. *Burrows* and *Usher*, plaintiff declares that the defendant having discourse of the plaintiff, said of plaintiff, *Your futher (innuendo plaintiff) struck and killed Nich. Russell*.

But

De Term. Pasch. 9 Geo. 2.

But judgment was arrested after verdict, because not averred the plaintiff was father to him to whom the words were spoken.

184. 404. 2 Leon. 112. 3 Leon. 177. Ray 4. 1 Sid. 16. 1 Co. 77. 4 Co. 18. Alien 3. 1 Rol. Rep. 244. 409. Moor 410. 187. Dalis 103. Yelv. 80, 88. Cro. Car. 140. 4 Burr. 2422.

Cro. Eliz.
346. 4 Co.
17. b. Cow.
276. Cro.
Jac. 163.

Cro. Car.
443. 1 Rol.
Rep. 79.

1 Rol. ab.
74. Hob.
126, 263.

[537]

Cro. Eliz.
416. 1 Rol.
abr. 39.
Moor 365.
2 Jones 5.
1 Com Dg.
179.

So likewise adjudged by three judges, (*Gawdy, contra*) Cro. El. 416. by all the justices, *Phelps and Lane*, Cro. Car. 92. So 1 Brownl. *Master Eustine is a rogue*, but there held well. 1 Rol. 84, 85. Cro. Car. 177. Shelman. Court divided, Cro. Car. 420. 4 Inst. 17, 18. Resolved, that in action of slander two things are requisite, the person must be ascertained, and the slander must appear from the words themselves, and cannot be supplied by an innuendo. Hob. 267. Innuendo will not ascertain the person of plaintiff. 1 Rol. Abr. 74. Words must be such as by-standers may understand them of the plaintiff. So Yel. 51. Mo. 132. Cro. Eliz. 496. Words spoke in Latin, there must be an averment the by-standers understood the language, so if spoken in Welch. The denomination of brother is very extensive and uncertain; all relations by marriage, nay all in like office or employment, are often called brothers.

But where the words denote a person present or a person certain, there declaration is sufficient, if it alledge the words spoken of the plaintiff without other averment.

As in the case of *Woodroof and Vaughan*, Cro. El. 420. *I did not know that Woodroof was thy brother, he hath forsworn himself, I will prove him perjured*; declaration held good.

So *Nelson and Smith*, Mich. 22 Car. in the king's bench, defendant having discourse of plaintiff, said of the plaintiff, *Captain Nelson is a thief, &c.* good without averment that the plaintiff was a captain, or known by that name, for a plurality of *Nelsons* shall not be intended.

Brown and Lane, 2 Cro. 443. *Thy master Brown hath robbed me*; resolved declaration good, though no conversation of plaintiff, or averment he was his master, for it shall not be intended he had more than one master. 1 Rol. Abr. 79. S. C.

Go tell thy landlord he is a thief, 2 Rol. 79. 2 Cro. 107. *Thy brother*, meaning the plaintiff, *is perjured*; held good without

De Term. Pasch. 9 Geo. 2.

without averment. *Wiseman* and *Wiseman*. So Ray. 86.

CHIEF JUSTICE: The verdict hath found the words spoken of the plaintiff, otherwise the plaintiff could not have had a verdict; the cases 2 Cro. 443. *Brown* and *Lane*, and 2 Cro. 107. *Wiseman* and *Wiseman*, seem in point.

If there had been no allegation that the words were spoken of the plaintiff, the Innuendo would not help; words are not so strictly construed as heretofore, and good reason for it, since discouragement of actions for slander will encourage revenge in another manner.

Libel is sufficient, when alledged to be of and concerning the king and government, the ministers, &c. the other [531] is matter of evidence, whether the words concerned them or not.

The other judges concurred in the same opinion; and judgment was given for the plaintiff.

Case 218 *Joshua Hands versus Herbert James*. In C. B.

Whether it shall be left to a jury to determine whether the witnesses to a will (being all dead) set their names in the presence of the testator, merely upon circumstances without any positive proof.

EJECTMENT on the demise of ——— *Hutchinson*, 1 Oct. 8 Geo. 2. at trial at sittings 17 Feb. 8 Geo. 2. before Chief Justice EYRE, the plaintiff's lessor made title to the premises as heir at law to *William Hutchinson*; defendant on evidence shewed, that *William Hutchinson* and *Hannah* his wife were joint purchasers in fee; *Hannah* survived, and by will 28 April 1719 devised to the defendant; at the execution of the will, the words subscribed are signed, sealed, published and declared by testatrix as her last will and testament, in presence of us; and then three witnesses set their names; but those witnesses being all dead, there was no proof that the witnesses set their names in presence of the testatrix, but one witness was an attorney of good character; and it was left to the jury, who found verdict for the defendant.

But it was agreed by consent a case should be made and left to the opinion of the court, whether this matter should have been left to the jury to determine, Whether the witnesses set their names in presence of the testatrix?

Serjeant EYRE for the plaintiff. This was a necessary circumstance by the statute of frauds to be proved; it is expressly required, that the witnesses should set their names in the presence of the testatrix.

And

De Term Pasch. 9 Geo 2.

And it appears by the case, that it was not proved, for all the witnesses, that could have proved it if it was done, were dead, and therefore it ought not to have been left to the jury, who could no more tell it was, than that it was not so.

Serjeant CHAPPLE *contra*: The query is not, whether the witnesses should subscribe in presence of the deviser, but whether the evidence of this should not be left to the consideration of the jury? If the jury cannot have express proof, they may determine on circumstances; as in case of livery on a feoffment when it is not indorsed, or a deed proved by the counterpart when the original is lost.

[532]

Per cur'. This is a matter fit to be left to the jury, which is all that is referred to the court. The witnesses by statute of frauds ought to set their names as witnesses in presence of the testatrix, but it is not required by the statute that this should be taken notice of in the subscription to the will; and whether inserted or not, it must be proved; if inserted, it does not conclude but it may be proved *contra*, and the verdict may find *contra*; then if not conclusive when inserted, the omission does not conclude it was not so, and therefore must be proved by the best proof the nature of the thing will admit.

In case the witnesses be dead, there cannot probably be any express proof, since at the execution of wills few are present but deviser and witnesses; then, as in other cases, the proof must be circumstantial, and here are circumstances.

1. Three witnesses have set their names, and it must be intended they did it regularly.

2. One witness was an attorney of good character, and may be presumed to understand what ought to be done, rather than the contrary.

And there may be circumstances to induce a jury to believe that the witnesses set their hands in presence of the testatrix rather than the contrary; and it being a matter of fact, was proper to be left to them; as, Whether livery was given on a feoffment, when no livery is indorsed; whether a deed was executed, when only a counterpart was produced, &c. And the court was of opinion the plaintiff ought to be nonsuited.

[533]

Newberry

Case 219 Newberry and his Wife *ver.* Stradwick. In C. B.

Sufficient to
insert in the
copy in the
issue, by way of replication to a plea of *nil tal. record.* *Quod habetur tale recordum*, tho'
not under counsel's hand.

DEBT in this court on judgment in the King's Bench,

Defendant pleads no such record.

Plaintiff replies, *habetur tale record'*, and a day given to bring it in.

Upon this the defendant made up the issue, and delivered a copy of the issue with the replication, which was accepted by the plaintiff, and paid for, and the record not being brought in, the defendant signed a *non prof.*

Now moved by Serjeant BELFIELD, that when no such record is pleaded, where the record lies in the same court, upon which it is prayed *quod per cur' videar'*, &c. the issue may be made and delivered, and it is well.

But when record is in another court, there ought to be a special replication delivered, *quod habetur tale recordum*, under counsel's hand; and it is not sufficient to insert it in the copy of the issue delivered, for thereby the king will be defrauded of the stamps.

And it was agreed, that there ought to be a replication *quod habetur tale recordum.*

But it was certified by the prothonotaries, that of late it hath been held sufficient to insert such replication in the copy of the issue delivered, and that being on stamped paper, it is the same thing in respect to the duty as if delivered in a paper by itself.— And prothonotary Barrett said this

[534] had been several times done and allowed.

And prothonotary Thompson said, that the plaintiff having accepted the copy to the issue, and paid for it, it was too late for him to complain of it; for if he had not acquiesced in it, though he could not refuse to pay for the copy of the issue, yet he should have struck out that part.

And Sir GEORGE COOK prothonotary shewed a cause, where after paying for the issue, it was held too late to complain.

And the court was of that opinion.

TRESPASS for entering his chamber at *Bernard's Inn*, *London*, and taking his chair value 50s.

On not guilty, the jury find a special verdict to this effect:

That the parish of *St. Andrews Holborn* lies part in *London* and part in *Middlesex*; That Sir *Francis Child* alderman of *London* 6 May 1732. appointed overseers for that part within *London*, and two justices of peace nominated overseers for that part of *Middlesex*, and the churchwardens and overseers rated the parish to the poor, which was approved, &c. and thereby the plaintiff was rated 1s. That the plaintiff inhabited a chamber in *Bernard's Inn*, being an attorney of the king's bench, and a member of that society, and having that chamber for the exercise of his profession, and having no other habitation; That *Bernard's Inn* lies in that part of the parish which is within *London*; that the defendants by virtue of a warrant from Sir *Francis Child*, then alderman, 11 July 1733. on plaintiff's refusal to pay the rate, distrained the said chair, being of 2s. value, as overseers of the poor; and after it was appraised, and sold for 2s. returned the 1s. overplus; that there are other chambers in *Bernard's Inn*, the occupiers of which were also rated; that *Bernard's Inn* is one of the inns of chancery used and inhabited by students and practisers of the law time out of mind, and dependant on *Gray's Inn*, as an inn of court for the study and practice of the law. And if the plaintiff on this matter be a person liable to be assessed to the said tax, they find for the defendant, if not, for the plaintiff.

Whether chambers in an inn of chancery are within the words or intent of 43 Eliz. ca. 2. ratable to the poor.

[535]

Serjeant WRIGHT, for the plaintiff argued, that he is not liable to be rated to the poor for his chamber in this case; for if it be within the statute 43 El. ca. 2. it must be as inhabitant of the parish, or as an occupier of a house within the parish.

By that statute, the churchwardens and overseers may raise a stock for the relief or employment of the poor by taxation of every inhabitant, parson, vicar, others, &c. and of every occupier of lands, houses, &c. in the said parish, in such competent sum as they shall think fit.

The word *inhabitant* in its largest sense comprehends every person that dwells in a place; but that could not be the

De Term. Pasch. 9 Geo. 2.

the meaning of the word in this act, for then all women, servants, children, &c. in a parish might be rated, which never was done.

But it may be taken in a more strict sense; as where stat. 22 Hen. 8. 5. for repairing bridges, enables justices of the peace to tax every inhabitant, Lord COKE saith, 2 Inst. 703. the act extends not to every person that hath personal residence, as servants, &c. but to such as are householders; and this appears by the fourth branch of the statute, which gives distress on every such inhabitant in his lands, goods, chattels, &c.

And it has been always held, that by stat. 43 Eliz. 2. the inhabitant is ratable in respect of his land or ability; so it was resolved 5 Co. 67. b. and so by the chief justice EYRE in this court, Tr. 5 Geo. 2. it was agreed. Fitzgib. 298.

But the plaintiff is to be considered as a guest occasionally residing in his chamber for the study and practice of the law, as an agent indeed for his clients in several parts of the kingdom. And by the order of all the judges of *England*, Mich. 3 Ann. the attornies are ordered to be admitted, and take chambers in some inn of chancery, or in lodgings near, &c. so that lodgings and chambers are looked upon as places of the same nature. A person that comes to the term may be a lodger, Latch 127. and a person at a chamber in the temple may take an examination in relation to a robbery as a justice of peace dwelling in or near the hundred, which is in a distant county; which shews he was not looked on as an inhabitant at his chamber. Cro. Car. 212.

Secondly, The plaintiff cannot be charged as the occupier of an house, for it is found there are many chambers in the house, and he hath but one. By the case Salk. 532. it seems as if the house ratable to the poor ought to be one intire house; though if several houses be joined into one, and several families live in it, or if one house be divided into two for several families, they may be rated severally; this is *Hospitium*, and *Domus & Hospitium* differ (Hob. 245). A man is not chargeable for a standing in a market. 2 Rol. abr. 289. 2 Rol. 238. All persons in colleges and inns of court may equally be charged.

Serjeant HAWKINS *contra*: The words of the statute 43 El. 2. are expresse, That a rate shall be raised by taxation of every inhabitant; and there can be no prescription against an act of parliament, therefore there is no force in the argument, that chambers have not been heretofore rated.

A chamber

An occupier of land in one parish may be

[536] charged to the repair of the church though he resides in another parish, on being sued the court may inquire of the quantity of land. 2 Rol. abr. 289, 291. 2 Rol. r.p. 170. Cro. El. 650, 666, 843. 5 Co. 66, 67. Salk. 164. Bullst. 20 3 Mod. 211. Vent. 367 4 Mo 148. Bun. 81. Hob. 67. 2 Lev. 102. 3 Burr. 1689. 3 Term. rep. 107.

De Term. Pasch. 9 Geo. 2.

A chamber is *domus mansionalis*, and burglary may be committed by breaking and entering into it with intent to commit a felony. Resolved Cro. Car. 474. H. P. C. 33.

It is objected, the plaintiff is there as a guest; but it is found he inhabits there, and hath no other habitation; so that unless rated here he can be rated no where. It is charity to the poor, which by the law of God and man every one ought to pay.

And an attorney hath no privilege to be exempt, altho' he hath privilege to excuse him for an office that interferes with his attendance at *Westminster*, as to be a soldier. 1 Vent. 436. to be a reeve, &c. March 30.

Although by *magna charta* it is enacted, that *ecclesia sit libera*, yet a parson, &c. is subject to all charges by act of parliament, much more an attorney; nor can any order of court exempt them.

In reply it was admitted, an attorney could not claim any exemption in respect of his profession, &c. But the sole question was, Whether chambers in an inn of chancery are within the words or intent of stat. 43 Eliz. 2. ratable to the poors rate? If they be so, no prescription, no orders of court can exempt them. But that they have been charged no instance can be given; and it will be equally the case of all scholars, fellows or students in the university or inns of court.

Ideo adjournatur.

Noxon *ver.* Lilly & al'. In C. B.

Case 221

TRESPASS for taking his goods.

first instance, if found, if not, to attach him by his goods, is a void process, will not make it good.

A process to take the body in the and custom

The defendants justify by process out of the court of record at *Worcester*, and alledge, that a plaint was levied by the defendant against ——— and that there is a custom, that on such plaint an attachment shall issue to take the defendant, if found in the jurisdiction; if not found, to attach him by his goods to appear, &c. That on such plaint by the defendant *Lilly* against the said ——— attachment issued, directed to the other defendants, to attach the plaintiff by his body or goods, which precept the defendant *Lilly* delivered

[538]

delivered to the other defendants, Serjeant at mace who took the goods in the declaration.

Plaintiff demurs.

Serjeant CHAPPLE: This process is not good, it is a contradiction in itself, for it is to take the body if found, if not found, to attach him by his goods, When shall he do so, or when shall he be said not to do so?

• He hath till the return of the precept to take the body, and before ought not to take the goods. In case act of parliament direct levying penalty by distress and sale, and if no distress, he shall be committed, there must be a new warrant for commitment after it appears there is no distress.

Secondly, The process issued pursues not what the custom alledges the process ought to be; for it is to attach the defendant by his body or goods, &c. without saying if defendant not found; so it leaves it to the discretion of the officer to take the body or goods at his election.

Thirdly, The taking so many goods as in the declaration, is extraordinary.

Serjeant HAWKINS: In case there be a mistake or error in the process, that shall not prejudice the parties to the suit nor the officer; and here, the process is not by grant but by custom.

[539] Cur': No difference between process by grant and custom, for if the king grants the privilege *tenere placita*, legal and usual process the grantee may issue as incident, and custom supposes a grant originally, but in both cases it must be a process legal; none can justify the restraint of another's liberty or taking away his property unless by the law of the land, that is he must have a lawful authority and must duly pursue it.

Here the process is to take the body of the defendant in the first instance, if he be found, &c. which is a void process, and custom will not make it good.

Case 222

Brice *ver.* Smith. In C. B.

If an estate be given to a man and his heirs and if he die without issue remainder

FORMEDON, defendant pleads *ne done pas*, on trial will was produced 28 July 1683, made by Philip Brice grandfather of the demandant, whereby he devises the premises to his son Philip (the father of the demandant) and his heirs, on condition that he pay 30l. to his brother William

William, &c. Then devises copyhold lands to his other sons in like manner; and in case any of my children die without issue, then I give the estate of him or them so dying, to the right heirs of them or him so dying, for ever; no subscription was signed, sealed and published, &c. but only the names of witnesses subscribed.

over, those words are explanatory of the word *Heirs*, and make an estate-tail.

Verdict for the plaintiff.

Serjeant WRIGHT insisted, this is an estate-tail in his son *Philip*.

Devise to his eldest son and his heirs, on condition, &c. ^{2 Cro. 827.} and if he die without heirs of his body, then to his other son and his heirs; and held an estate-tail in his eldest son.

Devise to his son and heirs, and if he die without issue, ^{2 Cro. 655.} to his daughter *Margaret, &c.*

So Lutw. 810, 813. 3 Cro. 525. Mo. 422. Ray. 425.

Serjeant EYRE, *contra*: The first question left to the court is, Whether there is sufficient proof of the will? [540]

But it was answered, This is a fact left to the jury.

2ly. This is an estate in fee, for devise is to *Philip* and his heirs expressly, and no limitation, if he die without issue, to any other persons, as in the case cited, but to the right heirs of the devisee himself. 1 Rol Abr. 536. pl. 7. devise to three daughters and heirs, and if either die without issue, then to J. S.; the three daughters have estate-tail and not a fee, for the limitation of the remainder over explains what heir he means, which imports, if no remainder over, the estate would be a fee.

I give my lands in A. to my son John, in B. to my son Stephen, in C. to my son Roger, and if any live to full age and have issue, to them and their heirs in like manner; but if any die without issue of his body, devises over. By 2 Inst. they have fee, and so at last resolved by the whole court. ^{2 Lev. 68.} ^{3 Lev. 115.}

Chief Justice seemed of opinion for demandant, for the words (*if he die without issue*) are explanatory of the word (*heirs*) in the first part of the will, and shews in the first words the testator meant to give to his son *Philip* and his heirs (that is such heirs as were the issue of his body) and after to his right heirs generally.

If lands be given by deed to a man and his heirs, being understood to him and the heirs of his body, that makes an estate-tail.

But it was said that the tenant in this case was a purchaser, and therefore a further argument desired, which was granted, and therefore adjourned.

And

De Term. Pasch. 9 Geo. 2.

And afterwards Pasch. 10 Geo. 2. Judgment was given for the demandant by the whole court.

[541]
Case 223 *Cornish ver. Trefey & al'. In C. B. Intr. Hill.*
9 Geo. 2. Rot. 1886.

Misnomer
improper
for a de-
murrer, but
ought to be
pleaded in
abatement.

TRESPASS against three defendants, *William Trefey, Charles Lamb, Edward* otherwise *Edmund*.

The two first defendants pleaded not guilty, and the said *Edward*, who was attached by the name of *Edmund*, makes defence and demurs.

And by serjeant BELFIELD it was argued, that a man could not have two christian names, and therefore defendant sued by the name of *Edward* alias *Edmund*, could not be so sued. 2 Cro. 558. Lutw. 294.

But it was answered by serjeant WRIGHT, and agreed by the court, that this matter is improper for a demurrer, but the defendant should have pleaded it in abatement, and then the plaintiff might have replied, and the plaintiff might have known against whom to have a new action.

And in pleas of abatement, defendant must always give the plaintiff a better writ; besides the court cannot judically take notice that the defendant's name is not as he is named in the declaration.

As a man may have several names added together at his baptism, as *Edward, Edmund, Edgar*, which all make but one christian name; so it is not impossible but he might be christened *Edward* alias *Edmund*; and the defendant admits himself to be the same person, by saying *and the said Edward*. Lutw. 10.

So judgment for the plaintiff.

[542]
Case 224 *Scrape ver. Rhodes & al'. In C. B.*

A devise to
E. H. and
her heirs,
and if she
and D. S.

die without issue, he gives several annuities charged upon the premises to charitable uses; held that E. H. had an estate in fee.

EJECTMENT on demise of *J. Surby*. On not guilty, jury find,

That *Nathaniel Hudson* was seised in fee of a moiety of 150 messuages, and also of seven messuages in or near
Saffron

De Term. Pasch. 9 Geo. 2.

Saffron Hill in *St. Andrews Holborn*; and by will 3 Nov. 1699 devised the seven messuages to his sister *Elizabeth Hudson* and the heirs of her body, and for want of such issue to *Dorset Surby*, son of his sister *Martha* and his heirs and assigns; and his moiety, &c. of all messuages, &c. he devised to his said sister *Elizabeth* and her heirs; and in case his said sister and *Dorset Surby* both depart this life, having no issue of their or either of their bodies, he gives several legacies to charitable uses payable for ever; remainder to such uses as his sister *Elizabeth* shall appoint, which payments to charitable uses he directed should be paid after such decease of *Elizabeth* and *Dorset Surby* without issue, by such persons as should enjoy the said moieties and estates; and as to the other moiety, he gave the same to his sister *Martha's* son *Dorset*, &c.

By lease and release 6 & 7 Sept. 1705, *Elizabeth* conveys the premises to her devised, to the use of herself for life; then as to one moiety to *Sarah* for life, then to trustees, &c. then to her first and other sons in tail, then to her daughters, &c. then to such uses as *Elizabeth* shall direct; as to the other moiety, to the use of the said *Dorset Surby* for life, &c.

Elizabeth dies without issue; *Sarah* dies leaving issue *Anne* and *Elizabeth Bealings*; *Dorset Surby* has issue two sons, *Hudson* and *John Dorset*, and *Hudson* dies without issue, *John* enters and makes the demise to the plaintiff.

Serjeant SKINNER: The case is shortly this: *Nath. Hudson* seised in fee, by will devised to his sister *Elizabeth* in fee the moiety of 150 messuages, and to *Dorset Surby* seven other messuages, on failure of issue of the body of his sister *Elizabeth*; and in case both the said *Elizabeth* and *Dorset Surby* depart this life, leaving no issue of their or either of their bodies, then he devises out of his said moieties and estates in *Saffron-Hill* and *Chick-Lane* for the maintenance of poor children in *Christ's Hospital* 10l. a year for ever; and for relief of the poor in the freedom of *London St. Sepulchre's* parish 10l. a year for ever; and 20l. a year to *Hannah Blake*, daughter of his kinsman *James Linwood* of *Colchester*; which three sums he directed should be paid yearly, after the decease of his sister *Elizabeth* and kinsman *Dorset Surby* without issue, for ever, on the 5th of November, by such person as shall enjoy the said houses, &c.

Elizabeth died without issue 1709. *Dorset Surby* survives and enters, and dies, leaving *John Surby* the lessor of the

H h

plaintiff,

plaintiff, (his eldest son *Hudson Surby* dying without issue in his life time) and two daughters, *Sarah* and *Elizabeth*, of whom *Sarah* married *Richard Bealing*, by whom she left issue *Anne Elizabeth Bealing*, now living. The question is, whether the seven messuages, and the moiety of the other messuages of the testator, (which are the premisses in the declaration) belong to the lessor of the plaintiff?

I apprehended it cannot be disputed, as to the seven messuages, but that an estate-tail did vest in *Elizabeth Hudson*, with remainder to *Dorset Surby* in fee; for the devise of them is expressly to *Elizabeth* and the heirs of her body, remainder to *Dorset Surby* and his heirs; and the lessor is his heir, so that as to them there can be no question.

[544] As to the moiety of the other messuages devised to his sister *Elizabeth* and her heirs, I beg leave to insist, that she had only an estate tail in them, and then her conveyance by lease and release 6 & 7 Sept. 1705. will be void; for the subsequent words in the will, *in case the said Elizabeth and Dorset Surby both depart this life, leaving no issue of their bodies, or either of their bodies, then such charitable legacies shall be paid for ever*, shew the testator's intent, that *Elizabeth* should have the moiety of the houses devised only to her and the heirs of her body.

In *Clache's case*, Dy. 330. 1 Rol. Abr. 835. L. 35. it was held, That if a man devises land to A. his daughter and her heirs, and if she die without issue, it shall remain to B. and his heirs, and if both die without issue, then over to another; this is an estate-tail, though the devise was to A. and her heirs, which makes a fee.

Ante 90.
94. Moor.
422. 1 Co.
85. b. Cro.
Jac. 22.
290. Bridg.
1. Yelv.
209. 1 Rol.
abr 835.
Glb. Dev.
34. Raym.
453. 3 Bul.
195. 1 Salk.
226. Lord
Raym. 506.
568.
1 P. Wms.
23. 1 Stra.
730. 2 Stra.
1125. Cow.
234. 410.
833. Doug.
4. 221.
37. 3 Tem.
rep. 83, 84.

So if a man devise to his son *Richard* and his heirs for ever, and if he die within age of twenty-one, or without issue, it shall be divided among his other sons; it shall be an estate-tail. Cro. Eliz. 525. So *Webb* and *Herring*, 2 Cro. 416. and *King* and *Rumbal*, 448. *Nottingham* and *Jennings*, Salk. 233. So in the case of *Craven* and *Sandford*, H. 1726. A man devises to his two daughters and their heirs for ever, and if all my said children die without issue, then he devises over to another; it was held an estate-tail.

On the other side it was insisted for defendant, that the devise to *Eliz.* in this case was to, her and her heirs, and no devise of the lands over on her dying without issue, but only a devise of three legacies, which were to stand charged on the estate in case *Elizabeth* and *Dorset Surby* both died leaving no issue; a contingency which hath not yet happened.

Afterwards

De Term. Pasch 9 Geo. 2.

Afterwards Pasch. 10 Geo. 2. this case was again argued by Mr. serjeant CHAPPLE for the plaintiff, who urged, that *Elizabeth* had only an estate-tail in the moiety of the messuages no more than in the seven messuages; and although the moiety of that moiety be only in question, yet to collect the intent of the will the whole will must be considered.

Devise to one and his heirs, and to another and his heirs in other part of the will, they are joint tenants. So a devise to one and his heirs, and after a devise over on his dying without issue, shews what heirs were meant in the first part of the will; and so it shall be an estate-tail. [545]

Now here the devise of the seven messuages is to *Elizabeth* and the heirs of her body, and then to *Dorset* and his heirs; and the devise of the moiety to *Elizabeth* and her heirs gives but an estate-tail to both; for he after charges legacies to charitable uses on both estates, and they are given, if *Elizabeth* and *Dorset* both die without issue. That they are charged on both appears, because they are to be paid by those that enjoy the said houses, grounds, moities and estates, which words comprehend both the aforementioned estates, as well the seven messuages as the moiety of the 14th messuages.

Then he devises the remainder (that must mean the remainder of both estates) to such persons as *Elizabeth* shall appoint; so that here is a remainder limited to her in fee; and those words must signify nothing if the former devises did not make an estate-tail; and so are the cases, Mo. 127. Ray. 122. 2 Jon. 172. Ow. 29. 2 Cro. 416. 1 Rol. 836. L. 9 Co. 127.

Bridgm.
137. Swin.
112. Litt.
Rep. 8,
259, 347.
Moor 123.
Cro. Jac.
695. Cro.
Car. 367,
369. Hard.
149. Ante
375.

Serjeant EYRE *contra*: The charge of the legacies can be only on the moiety of the 150 messuages, and then the principal argument, why the last words made an estate tail, is taken away.

But it is plain the devise of the seven houses is given to *Elizabeth* in tail, remainder to *Dorset Surby* in fee, and then this charge of the charitable uses is only to take place in case *Elizabeth* and *Dorset* both die without issue.

As to the cases cited, they seem applicable where cross remainders are limited, but cross remainders take no place but where there is a necessity for it.

And afterwards Trin. 11 Geo. 2. the chief justice delivered the judgment of the whole court for the defendant. [546]

De Term. Pasch. 9 Geo. 2.

For in the former part of the will he expressly devises the seven messuages on *Saffron-Hill* to his sister *Elizabeth* and the heirs of her body, and after to *Dorset Surby*, the son of his sister *Mary*, and his heirs; and presently after the testator devises the moieties of other seventeen messuages to his sister *Elizabeth* and her heirs; whereby it plainly appears the testator well understood the difference of limiting an estate in tail or in fee; and therefore he could never intend that *Elizabeth* should have no other estate in the moieties of the seventeen messuages that are devised to her and her heirs, than we had by the devise of the seven messuages given to her and the heirs of her body.

It is sure, if a man in the former part of his will gives lands to another and his heirs, and after by subsequent clauses shews, that if he did die without issue, it should go to another; and that is all that can be inferred from any of the authorities cited in the argument of this case, which are all agreed, and need not now be repeated.

But here the subsequent clause relied on, to prove this estate-tail in the sister *Elizabeth* in the moieties of the seventeen messuages, is this:

But in case my sister Elizabeth and my nephew Dorset Surby die, leaving no issue of their or either of their bodies, he gives out of his houses and the said moieties three annuities, payable by them that should enjoy the estate after the decease of his sister Elizabeth and Dorset Surby without issue.

So that he does not devise the lands themselves, but only yearly sums of money payable out of the lands.

[47]

The intention therefore seems to be, as far as can be collected out of such obscure words, that his sister *Elizabeth* should have the estate in fee; but if she left no issue, and if his nephew *Dorset Surby* left no issue, (who was heir at law to *Elizabeth*, if she left no issue) then the estate should stand charged with those annuities in the hands of any collateral heir.

Judgment for the defendant.

Case 225 Athelstone ver. Moone and Willis. In. C. B.

A submission of all matters in difference, imports all

ON Motion for an ATTACHMENT, for not performing an award which had been made pursuant to a rule of court, it was objected by Mr. serjeant EYRE, that the award

De Term. Pasch. 9 Geo. 2.

ward was void; for the submission is of all matters between the parties, (without saying between them or either of them) so as the award be made of the premisses by such a day. But the award is, that the defendant *Willis* should pay a sum of money due by him to the plaintiff: as therefore the submission must be understood of joint demands which the plaintiff had against the defendants, this award of a several debt from one of them only is not within the submission.

But it was not allowed; for a submission of several persons of all matters in difference between them, imports a submission of all matters that either had against the other jointly or severally; and so it was held 1 Rol. 216. pl. 1. 8 Co. 98. *Basspole's* case; and the words *ita quod*, &c. do not in this case any wise restrain the arbitrators.

rep. 437. 1 Bulst. 123. Alley 52. 1 Sand. 32, 33. 1 Sid. 252. Hute. 9, 29. Y. lv. 203. Hard. 45. 4 Leon. 911. Dyer. 356. pl. 39. 1 Bulst. 125. Hob. 49. 1 R. ll. 253. 1 Bro. 58. March arbitr. 210. 2 Brownl. 310. Cro. Jac. 447, 448. Vide 1 Saik. 71. 6 Mod. 35.

matters
whicheither
party had
jointly or
severally a-
gainst each
other. Cro.
Fl. 838,
839, 858.
Cro. Jac.
200, 278,
355, 578.
Cro. Car.
216. March
arbitr. 177.
Noy 62.
1 Brownl.
58, 112. 2
Brownl.
309, 310.
1 R. ll. 256.
267. 1 Rol.

King *ver.* Harris. In. C. B.

Case 226

AN attachment that issued for a contempt was made re- turnable on Wednesday next after —

Serjeant CHAPPLE moved to quash it; for although the effoin-day was the day before, the term did not begin till the Friday, which being the day of appearance, the process ought not to have been returnable before, and consequently it is void, and ought to be set aside as a writ returnable at a day out of term.

Serjeant WRIGHT: This is not returnable at a day out of term, for the effoin-day is the first day of term.

And 1 Bulst. 35. it was held, that a judgment might be given on the effoin-day, and that when given in full term it relates to the effoin-day; that a judgment upon an inspection of an infant made on the effoin-day was good, for the parties may appear on the effoin-day, although the *Quarto die post* is the day of grace allowed them, before which no default shall be recorded.

But if the defendant do appear on the effoin-day, his appearance may be recorded, and he may then plead, and judgment may be then given.

An attach-
ment re-
turnable be-
fore the full
term, if af-
ter the
effoin-day,
which is
[518]
strictly the
first day of
the term,
held good.

And

De Term. Pasch. 9 Geo. 2.

And justice WILLIAMS said, that here a difference appeared between the *teste* and return of writs; for a return may be on the effoin day, though a writ shall not abate if returned on the *quarto die post*.

And CROKE said, if a man be bound to appear on the first day of term, he may appear on the effoin-day.

So it was resolved, That judgment by confession, H. 22 Jac. relates to the effoin, and so precedes a recognizance acknowledged 22 Jan. the day before full term. Cro. Car. 102.

Cafe 227

Craven *ver.* Hanley. In C. B.

Where the trespass is confessed by the defendant in his plea, the
[549]
plaintiff shall have judgment, though a verdict be found for the defendant.

TRESPASS for entering his close, and feeding his hay with defendant's cattle.

The defendant pleads, the plaintiff was possessed of a close called *Little Holme* in the said village, and the plaintiff 14 Oct. gave licence to the defendant to eat up the fog off the close in the said village with his cattle, at any time between that day and the 11 Nov. following; and that he put in the cattle in the declaration to feed the fog in the said close, and the plaintiff having an hay-stack in the close, for want of fencing about the said hay-stack his cattle eat the said hay, viz. six load of hay, part of the said hay-stack, *absque hoc*, That he was guilty at any other time than between the said 14 Oct. and 11 Nov. following.

Plaintiff replies of his own wrong, &c.

And after verdict for the defendant, Serjeant EYRE moves, that the plaintiff ought to have judgment; that this licence is no justification of feeding the plaintiff's hay, and consequently the trespass being confessed, plaintiff ought to have judgment.

Serjeant CHAPPLE for the defendant insisted, that this issue being found for the defendant, judgment ought not to be for the plaintiff.

It appears the plaintiff put a fence about his hay-cock, but it was insufficient; though the licence is to be taken strictly, yet the person licensed is excusable if his cattle against his will do eat the grafs where way, &c. is, to which license is given.

In Popham the title is Sir Wm. Webb *ver.* Paternoster.

Plummer and *Webb*, Popham 151. Noy 98. A. licenses B. to put a stack of hay on his land, after A. leases his land to W. whose cattle eat the hay; no trespass; cited 1 Vent. 44. and allowed, for B. ought to fence his hay at his peril. 1 Jon. 388. Serjeant

De Term. Pasch. 9 Geo. 2.

Serjeant EYRE *contra* : The trespass being confessed, the plaintiff ought to have judgment, though the verdict be found for the defendant, if the matter of the plea do not excuse the defendant in eating the hay with his cattle.

Now where licence is given, the party can only do what he is licensed to do. It is said, the cattle going in a way to which he is intitled are excused in eating the grass, that is eating what cannot be helped; he must say *raptim & sparsim*.

In the case of Poph. 151. the hay belonged to him who had licence to put his hay on the land, and then no doubt he ought to take care of it himself.

But here the hay belongs to the owner of the land, and the licence is to eat the fog of his ground, but not to eat out his hay.

And after the court was of that opinion; for the defendant ought to secure the hay at his peril, and he might justify the doing so, as it seems by the cases mentioned Poph. 151. Noy. 98. which are cited 1 Vent. 44..

Judgment for the plaintiff, who may afterwards have a writ of inquiry.

[551]

Term. Sanct. Mich.

9 & 10 Geo. 2. In C. B.

Case 228

Le Marque *ver.* Newman.

Notice of
executing a
writ of in-
quiry ought
to ascertain
time and
place where
it is to be
executed.

MOTION to set aside writ of inquiry for want of proper notice of executing it.

The notice was given at the *Three Tuns* in *Brook-street* in *Middlesex*; *Brook-street Stepney*, *Brook-street Hanover-square*, and *Brook-street Holbourn*, and though an affidavit was made on the other side, that there was no *Three Tuns* in any of those *Brook-streets* besides in *Brook street Holbourn*, and that writs of inquiry were usually executed there, yet the writ of inquiry and execution on it was set aside, for the notice ought to ascertain the time and place where the writ of inquiry is to be executed, so that the party may know certainly when and where to resort with his witnesses; and this ought to be done with so much certainty, that the defendant need not be put to the necessity of going over the county to inquire whither he is to resort; and therefore notice to execute it at the sheriff's office in *Northampton* hath been held ill; and so to execute it between ten o'clock and two in the afternoon; and the writ of inquiry was set aside by the opinion of all the Court.

[552]

Case 229

Smith *ver.* Richardson. In C. B.

In an action
for words,
upon not-
guilty
pleaded,
Whether
the defen-
dant can be
admitted to

ACTION upon case for slander, in saying *The plaintiff is a rogue and hath stolen my beer.*

The defendant at the trial before Baron FORTESCUE offered to give in evidence, in mitigation of damages, that the plaintiff was guilty of stealing his beer.

But counsel for the plaintiff insisting he could not, as the fact was felony, since he pleaded not guilty, but he ought to

De Term. S. Trin. 9 & 10 Geo. 2.

to have justified, and since he hath not justified, he shall not now charge the defendant with felony, though it be in mitigation of damages; and the Judge doubting of it, it was made a case for the opinion of the Court, where the action was brought.

to give evidence of the truth of the words spoken, (when they import a felony, in mitigation of damages.

Serjeant HAWKINS: Any thing that mitigates the damages may in action of case be given in evidence where the recovery is wholly in damages.

That the malice of speaking may be excused is evident from many cases; why not the falsity of which he is accused in the declaration, by shewing he spoke only what was true of the plaintiff?

In 2 Cro. 91, a man may shew in evidence, that he spoke the words not maliciously, but mentioned in a sermon only what he had read in the book of martyrs.

The defendant acts in such case at his peril, for if he attempts to prove the plaintiff a thief, and cannot do it, he aggravates the damage by charging him falsely in Court with such a crime.

But if the thing to be proved be a bar of all the damages, if pleaded, why may it not be proved in mitigation?

[553]

Serjeant CHAPPLE *contra*: It would be a great hardship on the plaintiff if the defendant should be at liberty to charge him with a felony at any time in any place, who hath no opportunity to make his defence against such a charge.

What was said or done at the same time may be given in evidence, and was now allowed by the Judge, and it was here done.

The cases cited chiefly go where the matter proved is in bar of the action, and defeats it.

Ordered to be spoken to again.

Gambier *ver.* Larkin. In C. B.

Case 230

DEBT on bond with a condition to be a true prisoner without making any escape.

The defendant pleads *J. Larkin* did remain a true prisoner without committing any escape, &c. Plaintiff assigns breach. that 13 Jan. *J. Larkin* made an escape; defendant rejoins, that *J. Larkin* went a little way out of the rules of the prison, but being sent for back by the plaintiff he immediately returned, with consent of the plaintiff,

When the defendant by his rejoinder de-parts, it is good cause of demurrer.

De Term. S. Trin. 9 & 10 Geo. 2.

1 Roll 806. plaintiff, was accepted as his prisoner, and so continued
Hob. 202. ever since; to which it was demurred.

Dalt Sher. Chief Justice REEVE. Here is a breach assigned, to
140. which defendant rejoins, that *Larkin* did make an escape,
Cro. Car. 14. for he saith he went out of the rules of the prison, which
3 Will. 295. is an escape, 3 Co. 44. and so by stat. 8 & 9 W. 3. 27. and
Plowd. 36. then he returned with consent of the plaintiff; now this is
b. 37, a. b. a departure; for if this would excuse the escape, it should
Co. Lit. have been pleaded at first.
206, a.
Cro. El. 5.

[544] But this plea in the matter of it is no excuse.
Benl. in It is not said he was retaken on a fresh pursuit, but he
Kelyn. 214. returned (being sent for) without saying when, or after
N. Benl. pl. what time, or any thing in certain.
267.
Benl. in So judgment for the plaintiff.
Ash. 29.

Case 231

Chambers *ver.* Gambier. In C. B.

In an action **D**EFT for the escape of one ——— *Lampton*. De
for an escape, de- fendant pleads, That *Lampton*, without knowledge
defendant of the defendant the warden of the *Fleet*, escaped, and be-
pleads that fore action brought, without knowledge of the defendant
the prisoner returned, and was in execution for the damages on the said
escaped and judgment, to which it was demurred.
returned be- Judgment for the defendant, *Niss, &c.* for this tanta-
fore the ac- mounts to a retaking on a fresh pursuit; and the same plea
tion brought without his knowledge, was held good. Hil. 8 Geo. 2. *Grey and Gambier*.
and was in execution for the damages on the said judgment; and it was held well, it being tanta-
mount to a retaking on a fresh pursuit. Vide Ante 553, and the cases there cited.

Case 232

Huxley *ver.* Clendon. In C. B.

Render of **M**OITION by Serjeant CHAPPLE, to vacate an entry
a prisoner by his bail, a surrender of a person to prison by his bail, made
is not com- Mr. Justice Denton's chambers and signed by him, on a
pleat till, davit, that *Clendon* and *Ambrose*, who were his bail, were
the fees are paid. to Judge Denton's chamber, and while the render was making
ing they talked about the fees, and *Clendon* said he knew the
fees as well as any one, but when the book was signed
Clendon went away, and the gaoler said he would take
care of him. 2 Keb. 2. Farresly 77.

Serjeant

De Term. S. Trin. 9 & 10 Geo. 2.

Serjeant WRIGHT, *contra*: The bail is not to pay the fees, and therefore the bail not chargeable if not paid; here is no imposition that appears upon the Court or Judge, and a record was never vacated, but where the Court was imposed on.

Per Cur. The query is, Whether here is not an imposition on the Court or the Judge, who acts in this case in aid of the Court where the render ought properly to be made; if a fee be due for the render, the render is not complete till paid, and the Judge who signs the entry of *commitit* on the bail-piece doth it on supposition that the fees are paid, and if they be not, he is imposed on, and the act ought to be set aside.

Ordered, in the absence of Chief Justice REEVE, that the Judge's name to the render on the bail-piece be struck out.

Howes *ver.* Haslewood. In C. B.

Case 233

DECLARATION is laid in the city of *Norwich*, but *Norfolk* is in the margin, and a writ of inquiry executed there.

Serjeant WRIGHT: If an action be laid in one county, and *venue* be laid in another county, it is fatal, and not helped by any of the statutes of jeofails, and so are several cases adjudged. *Lutw.* 225. 7. *Rol.* 432. But afterwards *Hil.* 9 Geo. 2. It was held by the whole Court, that it was helped by stat. 4 & 5 Annæ 16.

If action be laid in one county and the venue in another it is a jeofail, and helped by the 4th & 5th of Anne.

Richardson *ver.* Pattison. In C. B.

Case 234

IN ACTION *qui tam*, &c. on stat. 9 Anne, for that the defendant being a custom-house officer did solicit A. and B. to vote at the election of members for the city of *Carlisle*, the said A. and B. being electors and having right to vote at such election.

It was moved by Serjeants CHAPPLE and WRIGHT, that a rule of this Court should be made, that the plaintiff may have liberty to inspect the town-books where the freedoms of the said A. and B. are inrolled, and takes copies of the same, to be used at the trial of the cause; and the Court made a rule accordingly, Chief Justice REEVE absent; although

In an action *qui tam* on stat. 9 Anne, against a custom house officer, the plaintiff hath a right to inspect town books, and take copies to be used at the trial.

De Term. S. Trin. 9 & 10 Geo. 2.

although objected the plaintiff is no freeman, and ought not to be admitted to inspect into the books of the corporation to make evidence for his action; nor is here any affidavit, that the right of election was in the freemen.

But it was answered, the plaintiff hath a right, by being plaintiff in the action, to see what relates to that fact on which the action is grounded.

Case 235

Wayman *ver* Wayman. In C. B.

Bail shall be given in an action of debt on a judgment, notwithstanding a writ of error, if no bail in the original action, otherwise not.

SERJEANT CHAPPLE moved for bail. The case was, Judgment was given for the plaintiff, who brings debt on that judgment; the defendant brings error on the original judgment, and puts in bail to the writ of error; and moved that no bail being to the original action, bail might be to the action of debt on the judgment.

Mr. TOWNSEND cited a case where Chief Justice EYRE, consulted Judge TRACY.

Jackson and Duchot, Hill. 13 Geo. If bail be in the original action in case, and debt be brought on the judgment, no bail shall be required; but if no bail in the original action, but a writ of error be brought upon it, and then debt on the judgment, bail shall be given in the action of debt on the judgment, notwithstanding such writ of error.

D E

Term. Sanct. Hill.

[557]

10 Geo. 2. In C. B.

Blacklock *ver.* Mariner.

Case 236

TRESPASS for assault and battery 1 April; declaration charges another battery 2 April, and a third battery by the defendant 3 April.

The first count was for a battery by the defendant on *John Blacklock*, the second and third counts were for a battery by the defendant on the said *Samuel*, which was the name of the defendant, instead of the plaintiff, whose name was *John*; and a verdict being given for the plaintiff, and entire damages.

Where the name of the defendant is made use of in the declaration by mistake, instead of the plaintiff's, it shall be helped after a verdict.

Serjeant **EYRE** moved in arrest of judgment, because in this case the plaintiff recovers damages the defendant received by the battery on himself.

Serjeant **CHAPPLE**: This is a mere mistake in the clerk, and aided by the statute 16 & 17 Car. 2. which helps all mistakes of the christian and surname of the parties who are once rightly named before in the same record, and here *John Blacklock* is named right in the first count, and then when the subsequent counts say, that the said defendant did assault and beat the said *Samuel Blacklock*, there being no such person named before, it appears evidently that it was a mere mistake; and may be compared to the cases, where the plaintiff declares, that the defendant being indebted to the plaintiff, the said plaintiff did promise to pay to the defendant or *vice versa*, which have been always helped after verdict. 4 Mod. 162. Resolved in the King's Bench between *Stavely* and *Palmer*, 13 Will. 3. [558]

And of that opinion was the Court, and judgment given for the plaintiff.

Elizabeth,

Case 237 Elizabeth, Executrix of William Cartlitch, *ver.*
Sir John Eyles.

How far an
undertaking
for a third
person shall
bind.

ASSUMPSIT, wherein the plaintiff declares, that the defendant 27 Nov. 1729, in consideration that the testator at the defendant's request would give credit to *Thomas England* for any quantity of silver to work on as far as 300 or 400l. value, as the occasions of the said *Thomas England* should call for it, the said testator giving four or six months credit for payment, promised testator to be answerable to him for the credit of the said *Thomas England* as far as the said 300 or 400l.

And avers, that her testator, relying on the said defendant's undertaking, at divers times between 27 Nov. 1729, and 18 Jan. 1733, gave credit to *Thomas England* for silver to work on as his occasions called for it, to the value of 400l. and gave credit for payment, sometimes for four, sometimes for six months? and that on 18 Jan. 1733, there was due to the testator for such silver 338l. 3s. 2d. which *Thomas England* had not paid, and yet the defendant refused to pay the same.

On *non assumpsit*, and issue joined, the cause came to trial before Mr. Justice DENTON, and to prove the promise in the declaration, a letter from Sir John Eyles was produced in these words:—

[559] Mr. Tho. England, who delivers you this, is a silversmith, whose business is encreasing beyond his stock, and he has occasion for some credit, being obliged sometimes to work out his stock, before he can get his money for the plate he makes. I have a very good opinion of his honesty, and would be answerable myself for his credit, as far as 300 or 400l. if it be consistent with your business, to give him credit for any quantity of silver to work upon to that value, as his occasions call for it, (giving credit for four or six months payment;) if this proposition be at all agreeable, or can be made so, I shall be willing to talk further with you, who am,

Sir,
Your Humble Servant,
John Eyles

Directed to Mr. Cartlitch.

On this letter *William Carlitch* the testator intrusted *Thomas England* from time to time with quanties of silver, amounting in the whole to 1379*l.* for which he made *England* debtor in his book, and *England* always gave his note for the silver received, whereby he promised to pay for it, nor was any time limited for payment, nor did it appear that Sir *John Eyles* had notice that *Carlitch* trusted him at all, nor did he countermand *Carlitch* for doing so.

Mr. Justice DENTON gave leave to move the Court upon this letter for their opinion, whether this letter was sufficient evidence of the promise in the declaration attended with the above circumstances, which he said was the whole of the evidence given.

Upon this evidence Chief Justice and I thought a new trial might not be improper, since this letter was indeed proper evidence to be given to a jury to induce a belief, that Sir *John Eyles* had undertaken according to the declaration; and if it had been proved, that upon this letter Mr. *Carlitch* had signified to Sir *John*, that he upon this encouragement would trust *England*, or that Sir *John* had any knowledge he did intrust him with silver, and he did not controul his doing so, it might be sufficient for the jury to find for the plaintiff.

But as the letter only imported, that he had an opinion of the honesty of *England*, and on that account was inclined or disposed to become answerable as far as 300 or 400*l.* if consistent with his business to give such credit (for that is as much as the words can reasonably be strained to, it not being said, *I will be answerable*, but *I would or am inclined or minded to be so upon terms*) and then going on to tell him, *that if the proposition was agreeable, or could be made so, he would talk farther with him*; it seems to be only a proposal or communication, and not a compleat agreement, but a proper evidence, which with other circumstances concurring might be conclusive. [560]

And therefore if the defendant was privy to the trust given, and did not controul it, or was acquainted with the letter's being delivered and accepted, it might be fit to charge the defendant.

But it may be hard to charge him in case he had no notice, which by the judge's report of the case did not appear to have been given.

That *Carlitch* trusted him upon receipt of this letter does not import and notice to Sir *John Eyles*, for it appears not that

De Term. S. Hill. 10 Geo. 2.

that he trusted him on Sir *John's* account, for the credit in his books was given to *England*, and he took notes for the money from him.

No mention at all that it was done on the defendant's account, and it is usual evidence, when credit is given on another's account, to see how the credit is entered in the plaintiff's books.

It is sure assumpsit lies not upon mere communication, 1 Rol. Abr. 6. and this seems no more.

[56:] It refers to a future treaty or parlance, and if that had been so, the defendant might have been vigilant how *Thomas England* went on in his trade, might have put a stop to the credit given whenever he saw cause, or might have taken security from him, which, having no notice of such trust or dealing he could not do.

But Justice DENTON and FORTESCUE thought the letter itself contained a full promise from the defendant to pay what the testator credited him for not exceeding 3 or 400l. that the words (*would be*) were the same as *will be*, and the conclusion of the letter was rather artful than a design of farther treaty; and therefore a new trial was denied.

Vide stat.
29 Car. 2.
ca. 3.
1 Willf. 118,
305.
Ld. Raym.
1085, 1087.
2 Willf. 94.

Case 238

Leaver *ver.* Witcher. In C. B.

Motion to
plead dou-
ble denied,
after a judg-
ment that
had been re-
gularly ob-
tained, was
set aside, on
payment of
costs.

MOTION to set aside a judgment; which was granted on payment of costs, although the judgment was regular.

But when it was moved, that the defendant might have liberty to plead the general issue, and likewise *non assumpsit infra sex annos*.

But it was denied; for when a judgment is regular, and set aside upon the intreaty of the defendant to let him in to try the merits of the cause, it shall be only allowed to plead the general issue, and not the statute of limitations or other defensive plea, that goes not to the merits of the cause.

Termino Pasch.

[562]

10 Geo. 2. In C. B.

Shelly ver. Wright.

Case 239

DEBT on bond for 400l. wherein the plaintiff declares, *The county Middlesex to wit*, in the margin; *George Wright of Westminster*, Esq. otherwise called *George Wright* of the parish of *St. John the Evangelist, Westminster*, in the county of *Middlesex*, was summoned to answer *Charles Shelly*, Esq. in a plea that he render him 400l. &c.

Defendant after Oyer of the bond and condition (which was that the defendant give a true state of all fees, &c. received by him in the office of the plaintiff, as auditor of the alienation office, and pay the balance, &c.) prays judgment of the writ, for that in the writ and declaration there wants the addition of the county where the defendant is conversant.

To which it was demurred; and it was agreed that it was not sufficient within the statute 1 H. 5. 5. to give the addition in the *alias dict.* Resolved Cro. Eliz. 198. Mo.

354. Serjeant SKINNER for the plaintiff insisted, that the county in the margin will supply the want of it in the declaration, and so it was held *Norris and Friend*, Mich. 4 Geo. 2. the declaration was *Robertus Friend nuper de Westminster in comitu tua*; there was a demurrer to the plea in abatement for want of addition, as here, because in *comitatu tuo* refers to nothing, being incertain; but it was held that the county being in the margin supplied the omission, and the words in *romitatu tuo* shall be rejected as insensible; and by the course of Common Pleas the county in the margin is part of the declaration, though it be not held so in the King's Bench; county in the margin supplies omission in the declaration. 2 Cro. 69, 613.

The county being in the margin will supply the want of it in the declaration.

In an indictment the addition of a defendant's name must be before the *alias dictus*.

2 Hale 177, 178.

Cro. Eliz.

249, 583.

But the addition arise in an indictment against a female covert is sufficient.

2 Inst. 669. Theob. b. 6. c. 14, f. 9.

Moor 354. [563]

2 Leon. 138. 5 Ed. 4. pl. 41, car.

Co Lit. 3, 1 Com. Dig. 33, F. 24.

De Term. Pasch. 10 Geo. 2.

It is true in an indictment the omission of the county is not helped by naming the county in the margin.

And the opinion of the Court was, That the plea was ill, and a *Respond. Ouster* awarded.

Case 240 Skip *ver.* Hook. In C. B. Intr. Hill. 10 Geo. 2.
Rot. 369.

In an action on a promissory note against drawer, plaintiff need not alledge notice to the defendant of the indorsement.

ASSUMPSIT on promissory note by the defendant to pay *William Welch* or order, 50l. for value received; *William Welch* indorsed it over to the plaintiff, in consideration whereof the defendant promised to pay to the plaintiff, who, though often requested, refused, &c.

Defendant demurs, and shews for cause, that the declaration did not alledge notice to the defendant of the indorsement, and relied on case 2 Mod. Ca. 43. *Lawrence and Jacob*, where, after verdict and judgment for the plaintiff, the judgment was reversed in error for that cause. *Sed non allocatur*; for that case is misreported, for Justice *Fortescue* produced the paper-book in that case, and said it was Pasch. 8 Geo. and that the judgment was affirmed, and on the authority of that case, and on the reason of the thing; for the defendant by his demurrer admits that in consideration of the premisses, *viz.* defendant's making the indorseable note, and the indorsing it to the plaintiff, the defendant assumed to pay the money according to the tenor of the note.

Judgment was given for the plaintiff by the whole Court.

[564]

Case 241 Spinks *ver.* Bird. In C. B.

An exigent is superadded by a writ of error.

JUDGMENT for the plaintiff, a *cap' ad satis* issues thereon against the defendant, upon that *ca, fa*, an exigent was taken out, tested 7 Feb. then a writ of error was sued by the defendant, tested 5 Feb. and allowed 8 Feb.

Serjeant CHAPPLE moved that the plaintiff might proceed to outlaw the defendant, notwithstanding the writ of error; as if debt be brought on a judgment, and then a writ of error is sued on the judgment, the Court will permit the plaintiff in that action of debt to proceed to judgment, though they will stay execution.

Serjeant

De Term. Pasch. 10 Geo. 2.

Serjeant PARKER, *contra*: The writ of error is of itself a supersedeas.

It is true it is no contempt till notice, but by taking out the writ of error the Court is stayed from proceeding in the execution. 2 H. 7. 12. 2 Cro. 342. Godb. 439. 1 Vent. 30. 1 Mod. 28. The writ of supersedeas in error shews that an exigent is superseded. Rast. Ent. 309. b. pl. 10. Off. Br. 378. Thes. Br. 293. Cliff. 69, 694.

And of that opinion was the Court, for the exigent is only to carry on the execution.

Goodtitle *ver* Bradburne & al'. In C. B. Case 242

EJECTMENT on demise of *Isaac Colman*; on the general issue a special verdict is found to this effect:

Richard Lowth seised in fee, conveys to *Robert Colman* and *Mary* his wife, and to the heirs of the body of *Robert Colman* on the body of *Mary* his wife to be begotten, and for want of such issue, to the heirs of the survivor.

By lease and release, *Robert Colman* without his wife, conveys to *Edward Habersfield* and his heirs, to make him tenant to the precipe, on which a recovery was suffered, and was declared to the use of *Robert Colman* and his heirs; *Robert Colman* dies without issue, his wife survives; *Isaac Colman* his son and heir by a former wife, after the death of *Mary* his wife, claims as heir to *Robert Colman*, and brings his ejectment against those who claim as heir to *Mary* the wife, who was the survivor.

Serjeant EYRE insisted, that this recovery was good to vest the estate in the husband and his heirs, and prevent the taking of the heir of the survivor.

And this depends upon this question, Whether the husband alone could make a good tenant to the precipe.

It is plain, if the husband be seised in the right of his wife, he by bargain and sale may make a good tenant to the precipe. 1 Rol. Abr. 845. S. 4. 2 Rol. Abr. 394.

If the husband be jointenant with his wife and levy a fine, that makes a good tenant to the precipe; so it was held in *Cupledyke's case*, 3 Co. 6. Mo. 210. 2 Rol. 395.

Serjeant BELFIELD, *contra*: I admit the cases which say a man seised in right of his wife may make a tenant to the precipe; but here the husband is not seised in right of

I i 2 his

Whether a husband seised jointly with his wife, can without her make a good tenant to the precipe. [565] Cro. El. 21, 670, 828. Dyer 252. Moor 555. Cro. Car. 388. 1 Rol. abr. 868. Pigot on recov. 37. Shep. Touch. 43. Cruise on recov. 206.

De Term. Pasch. 10 Geo. 2.

his wife, but both are equally seised, for they take by entireties, therefore in such case the husband alone cannot make a tenant to the precipe.

1 Salk. 568.
Lill Ent.
92, 523

And so it was resolved in the case of *Owen and Morgan*, 3 Co. 6. Mo. 210. And the case is to the same effect in the reason of it. 1 Sid. 83. 3 Lev. 107, 108.

But it was adjourned.

[566]

Case 243 *Steward of Bury ver. Rabutin Sheriff of Suffolk.*
In C. B.

The sheriff's
deputy to
be entered
on record.

MOTION, that the sheriff of *Suffolk* hath usually appointed a deputy at *Bury* in order to receive and return writs, which the present sheriff refuses to do.

Rule was enlarged to shew cause why he should not make a deputy in the town, pursuant to a rule of this court, Hil. 14 & 15 Car. 2. Hil. 15 & 16 Car. 2. and Trin. 1 Jac. 2.

Enlarged to the first day of next term, Trin. 10 & 11 Geo. 2. The rule discharged, there being no cause in Court relating to this matter, nor any complaint by suitor of the Court.

Ordered, That for the future the sheriff's deputy be entered on record.

Case 244

Harvey ver. Stokes. In C. B.

The mistake
of the name
of a third
person is not
aided or am-
mendable,
though a
mistake of
the plaintiff
or defendant
is.

DEBT on replevin bond; defendant pleads that she did prosecute the replevin with effect, and the sheriff was not damnified; plaintiff replies that the plaint was removed by *recordari* to the Common Pleas, where judgment was given for *Thomas*, who was plaintiff in the suit, and a return adjudged *prout per record*; and so the said *Rebecca Stokes* did not prosecute with effect; nevertheless the said *Thomas* (who was plaintiff in the action) did not return the cattle, and this he is ready to certify; to which the defendant demurred, and the plaintiff joined.

And for cause of demurrer the defendant shewed the plaintiff hath not verified his replication.

[567]

This case was argued several times, and two objections made,

First, That that is shewn for cause of demurrer.

Secondly,

De Term. Pasch. 10 Geo. 2.

Secondly, That no breach of condition appears; for the condition is to prosecute with effect, and if adjudged there should be a return, that she would make return.

Now though it be shewn that *Rebecca* did not prosecute with effect; it is not shewn that she did not return the cattle, but only that *Thomas*, who was the plaintiff in the suit, did not return the cattle.

So there is no breach at all of the condition appearing.

And now Chief Justice WILLIAMS gave the opinion of the Court for the defendant, because the plaintiff had assigned no breach, and the mistake of the name of a third person is not aided or amendable, though a misnomer of the plaintiff or defendant be so. But as to the word *certify* instead of *verify*, the Court held it to be to the same purpose, and well enough.

Bridg. 100.

2 Lev. 117.

[568]

Term. Sanct. Trin.

11 Geo. 2. In C. B.

Case 245

Trevet *ver.* Angus.

In a defeazance to a bond, it is not necessary to recite the bond.

DEBT on a bond 4 June 1727, for 8 l.

After Oyer of the bond and condition, which was to pay 40l. and 20l. on the 25th of December then next, defendant pleads, that on 12 Mar. 1729, there being but 40l. due on the said bond, the plaintiff did covenant, that if the defendant did pay 5s. in the pound on 25 Dec. next for every 20s. due to the plaintiff from the defendant, and so at the same rate for every greater or lesser sum than 20s. on or before 25 December next, then the plaintiff should and would accept the same composition of 5s. for every 20s. in full discharge of all sums of money as then were, or on the said 25 Dec. should be due from the defendant to the plaintiff, and that on payment of the said sum of 5s. in the pound, or 5s. for every 20s. to the plaintiff, according to the intent of the said deed, then the said deed should be a release to the defendant, to be pleaded or given in evidence.

That on 12 Mar. 1729, she was not indebted more than 40l. and then she tendered 10l. which was 5s. in the pound, which the plaintiff refused to accept.

Plaintiff demurs, and shews for cause, that the defendant did not shew that he was still ready to pay.

[569]

Serjeant WRIGHT for the plaintiff insisted, that this was no defeazance, but a covenant; For,

First, It has no relation to the money due upon the bond for although it saith by way of recital, or supposal rather that money was due from the defendant to the plaintiff and the defendant avers, that she was indebted by bond 40l. and interest, and all but 40l. was paid to 12 Mar. 1729, yet the words of the deed are, *That if the defendant*

pay 5s. in the pound for every 20s. due to the plaintiff from the defendant, and so at the same rate for every greater or lesser sum than 20s. on or before the 25th of December, the plaintiff should and would accept the same in discharge of all sums as then were, or on the 25th of December, should be due from the defendant to the plaintiff.

So that the deed imports, 5s. in the pound should be paid, not for the sum in the bond, but for whatever sum of money should be due to the plaintiff, from the defendant on the 25th of Dec. next.

Secondly, It is to be a release on payment of the money; and though tender and refusal may be equivalent to payment, and he covenants to accept this composition, his non-acceptance is a breach of his covenant, but it becomes not a release till payment.

Thirdly, She would have pleaded it with an *uncore prift*; for although tender of collateral sum being made, if it be refused, it need not be pleaded with an *uncore prift*; yet when the payment is to be of a lesser sum in lieu of a greater, it ought to be so pleaded.

But it was recommended to the parties to agree this matter, it being hard, when a composition was agreed to by the plaintiff, that he should come upon the defendant for the whole debt.

And on the other side it would be hard that the plaintiff should lose the 5s. in the pound, which the defendant tendered, though she hath not brought the money into Court, if this be necessary.

But the plaintiff not complying to any end, now the last day of Trinity term, 21 June 1738, the Chief Justice delivered the opinion of the whole Court for the defendant; and gave the reasons in answer to the objection made.

First, This is a defeazance to this bond, and sufficiently relates to it; for it is not necessary to recite the bond, no more than where a power of revocation is inserted in a deed; a revocation by a subsequent deed is good, though it doth not recite or mention the power, or in direct words refer to it. 10 Co. 143, 144. *Scroop's case*.

They also held, that it was not necessary in this case to plead with an *uncore prift*, or to bring the money into Court. Co. Lit. 207. 9 Co. 79, b. Cro. El. 755. Mo. 36.

Note, Powers of revocation are to be largely taken. Com. 11, 12.

Matlem

[570]

Ray. 311.
Hob. 313.
Cro. Car.
472.
2 Roll. 262,
263.
1 Jones 393.
6 Co. 33, b.
Co. Lit. 237,
a.
1 Sid. 343.
Winch. 83.
Co. Lit.
208, b.
1 Roll. 472.
Doct. pl.
390, 391.

Case 246 *Matlem ver. Bingle & ux' & al.* In C. B. Int.
Trin. 11 Geo. Rot. 1275.

A papist
may devise
his estate to
be sold in
order to pay
money he
owes other
papists, not-
withstanding
the statute
11 & 12
W. 3.

EJECTMENT on demise of *John Marsh* and *John Amyas*,
of a messuage, garden, orchard, 100 acres of land,
and 100 of meadow, and 100 of pasture, in *Woodrising* in
the county of *Norfolk*, made 10 April 10 Geo. for sixteen
years.

At the assizes at *Norwich* 26 July next, before Chief Jus-
tice **RAYMOND**, a special verdict was found to this effect:
John Bedell was seised in fee of the premises in question
1 Feb. 1707. and was a papist, and died so seised 28 Feb.
1707.

[571]

That *Geo. Bedell* his brother and heir was born 1 Aug.
1681, and was under the age of eighteen years at the time
of making the act for the further preventing the growth of
popery, and of the age of twenty four years at the time of
his brother's death; on whose death he entered into the
premises as heir to his brother, but was a papist, and con-
tinued so to his death, and never took the oaths, nor sub-
scribed the declaration 30 Car. 2.

By will 9 Aug. 1715, *Geo. Bedell* devises the lands and
tenements in question to *John Marsh* and *John Amyas* and
their heirs, to the use of them and their heirs, on trust that
they in the first place, by and out of the rents and profits,
or by mortgage or sale, &c. raise money sufficient to pay
all the debts he should owe at his decease to *John Marsh*,
and all his other debts and legacies and funeral charges, and
the charges in executing the trusts; then to pay 150l. a
year to his sister *Elizabeth*, wife of *John Matlem*, for her
life; and 25l. a year a piece to his sisters *Isabella* and
Mary for their lives; and subject to these trusts shall per-
mit *Robert*, son of *John Matlem*, to receive the residue of
the profits of what remains unfold till the age of twenty-
one, and then shall convey to *Rob. Matlem* and his heirs,
and died 19 Aug. 1715.

That four days before his death *Elizabeth*, wife of the
defendant *John Bingle*, who was his sister and next of kin,
and a protestant, entered and took possession; that after his
death *John Marsh* and *John Amyas* the trustees entered,
and demised to the said *Robert Matlem* the plaintiff for six-
teen years, whom *John Bingle* and his wife ousted; and
upon this demise he brings his ejectment.

The

The general question was, Whether *Geo. Bedell*, being under eighteen at making the statute 11 & 12 W. 3. attaining afterwards his full age, and not taking the oaths or qualifying himself as that statute requires, could make the devise to these trustees who are protestants, upon trust for payment of debts and legacies, and after for *Robert Matlem* a protestant.

[572]

And as to that point it was argued by Serjeant WRIGHT, for the plaintiff, that a papist, notwithstanding the statute 11 & 12 W. 3. is enabled to dispose his estate by will.

He hath the freehold in him, he is seised, else he could not convey; and as he may convey by deed, so he may likewise devise.

It is true, if he devise to a papist, such devisee is disabled by that statute to take, for the devisee must take by purchase.

So if he devise to protestants in trust for papists, or to raise money, or pay legacies, such trust or legacy would be void; and that was the case of *Roper* and *Ratcliff*.

And in Easter term 13 May 11 Geo. judgment was given for the plaintiff by the whole Court.

And Chief Justice WILLES gave the reasons of the judgment, viz. That though *Geo. Bedell* was under eighteen at making the statute 11 & 12 W. 3. yet after professing himself a papist, and not taking the oaths, he is disqualified as well as other papists; yet the disability incurred by this statute is very near the words in stat. 1 Jac. which do not prevent his having or being seised of the estate, and consequently he may dispose of it; he may take any personal legacy or gift, so cannot be resembled to a monk, &c. He may bring waste, nay he may take a real estate *in fee*, &c. he takes for the benefit of his protestant heir if he conforms, and for the benefit of himself when he conforms.

The inheritance must be in some body, it cannot be in the King, for it is given to another; it cannot be to the next of kin, for he hath but the rents and profits; it cannot be in his heir, for *nemo est hæres viventis*; *Thornby* and *Metwood* on stat. 1 Jac. Hob. 73. on stat. 3 Jac. shewed they were seised who are papists, notwithstanding those statutes; and clauses which give papists debt and waste strengthen this construction.

[573]

Besides, it seems most agreeable to the intent of the legislators, which was to encourage the bringing papists estates into

into the hands of protestants, which is best done if they may devise or convey to them.

As to the trusts upon which this estate is devised, the annuities and legacies are all to protestants, and the remainder is to *Robert Matlem* a protestant.

But it was objected, that if a papist can devise his estate to be sold for payment of debts, he may run in debt to papists, and so sell his estate from his protestant kin.

But it is not found any debt is due to a papist, and it shall not be intended they are so; it will be time enough to consider this when it comes to be the case.

But a papist may sell his estate and give the money to papists; Why may he not devise it in order to pay what money he owes them?

Judgment for the plaintiff.

Case 247

In a scire facias on a recognizance of bail, defendants demurred, because it was not sufficiently averred, that the plaintiff was the same person to whom they were bound; but held no cause of demurrer.

3 Idem. 6.
pl. 25.
34 Hen. 6,
19, b.

[574]
2 Roll. abr.
21.
Dyer 279.
Owen 48.
Cro. Jac.
558, 640.
1 Lut. 519,
1 Salk. 6.
Mod. Cal.
225.

Matravas ver. Aldam and Brown. In C. B.

SCIRE FACIAS against the defendants on recognizance of bail for *Aaron Laws*, wherein they are bound to *John Matravas*, the younger in 92l. on condition, that if the said *John Matravas* recover against the said *Aaron Laws*, and he did not pay, &c. they should render the defendant, or pay condemnation; then alleges, that although the said *John Matravas* the younger, by the name of *Matravers* recovered judgment M. 10 Geo. 2. against the said *A. Laws* 80l. and 15l. 10s. costs, and had not been paid, yet the defendants had not rendered, &c. Defendants demurred.

And Serjeant BELFIELD insisted,

First, That the bail was not liable, because the recognizance is to *John Matravers* the younger, and no averment, that the plaintiff in the action, named *John Matravers* without addition, is the same person.

Secondly, If there was an averment, it would not be no more than if *Edward* signs bond, and is sued by the name of *Edmund*, which is his true name, to say *Edmund* by name of *Edward*, &c. became bound, &c. Cro. 897. 2 Cro. 640. Lut. 894, 895.

Sed non allocatur; for here is sufficient averment, it is not like the cases cited; therefore Judgment for plaintiff.

Mora

TRESPASS for assault, battery and false imprisonment.

Defendants as to all but assault and imprisoning, and detaining in prison twenty-eight days, Not guilty.

As to assault, imprisoning and detaining in prison twenty eight days, defendants plead,

That the borough of *Devizes* is an ancient borough, and 9 May 1735. at a Court held for the said borough within jurisdiction of the borough, before the mayor, recorder, and three counsellors of the borough, by virtue of letters patent of King *Cha. 2.* dated 5 June in the 15th year of his reign, *James Batten* levied a plaint against the plaintiff, of a plea of trespass on the case, to his damage of 40l. and prayed process; and thereupon at the same Court a precept issued to the bailiffs and serjeants at mace of the Court, commanding them to take the plaintiff, and to have his body before the mayor, recorder, and three counsellors, at a court to be holden on *Friday* the 6th of June next, which precept 9 May 1735, aforesaid, was by *William Salmond*, attorney of the plaintiff *James Batten* in the said suit, and at the request of *James Batten*, two defendants, delivered to the defendants *James Williams* and *James Parker*, then and till return the bailiffs and serjeants at mace, &c. who, requested by them and other defendant *Robert Sloper*, arrested the plaintiff, and detained him the said twenty-eight days, till at the Court 6 June following, held before the mayor, and three counsellors by virtue of the said letters patent, they returned the precept duly executed, which is the same assault, &c.

To which plea the plaintiff demurs, and the defendants join in demurrer.

And for the plaintiff it was insisted, that this plea is ill.

For first, It doth not shew, that the matter for which this precept was levied was within the jurisdiction of the court; and although the officer may be excused who is bound to obey the precept, although the matter be not alleged to be within the jurisdiction, 1 Lev. 95. yet the plaintiff in the action, and *Sloper*, who is a stranger, ought to shew it. 2 Mod. 29, 129, 195. 3 Lev. 20, 242. 1 Vent. 369. 2 Mod. 192.

In justifying under the process of an inferior court, it is necessary to shew, that the precept levied was within the jurisdiction of the Court.

[575]

And

De Term. S. Trin. 11 Geo. 2.

And if the plea is ill as to one defendant, it is so to all, if they join in pleading; and so it was held between *Richard* and *Bowler*, 3 W. & M.

And by the Court the plea is ill for that cause, and was so determined in this Court Tr. 8 Geo. 2. and in the case of *Gwyn* and *Pool*, 2 Lut. 1560. The reasons are,

First, That the plaintiff might not know the extent of jurisdiction, but it is his default to sue where he knows not the jurisdiction, when he may sue in Courts above.

[576]

Secondly, Defendant may plead to the jurisdiction of the Court, but that is not an adequate remedy; and then this plea is likewise ill, because it does not appear the Court of *Devises* had jurisdiction in personal actions. And this is bad even in respect to the officer, for it must have shewn the justice of peace had authority in the matter.

Thirdly, There was a *capias*, although no summons or precept. 1 Vent. 220.

Judgment for the plaintiff.

Case 249

Reason *ver.* Lisle. In C. B.

In an action of debt upon the statute 4 & 5 Ann. for keeping and using a dog to kill the game, it is necessary to shew what sort of dog it was.

DEBT on the statute 4 & 5 Ann. 14. on five several offences against that statute.

1st and 2d, That the defendant used an engine called a gun.

3d, That the defendant kept and used a dog to kill and destroy the game, not being qualified by the statutes of this realm so to do.

4th, That the defendant exposed to sale an hare, not being intitled to the said hare under any person qualified to kill game.

5th, That the defendant exposed a pheasant to sale, not being intitled under any person qualified to kill game.

After *nil debet* pleaded, a verdict was found for the plaintiff and damages.

And now the defendant moved in arrest of judgment, and took the several exceptions.

First, That it does not appear on which count the damages are found.

[577]

Sed non allocatur; for it is frequent when several counts are in a declaration, that damages are given more or less than the sum in any one count; yet held well.

Secondly,

Secondly, That the two first counts are for keeping or using a gun, whereas a gun is not mentioned in the statute. *Sed non allocatur*; for if he had been charged for using a gun to destroy the game contrary to the form of the statute, this after verdict had been sufficient; for the statute saith, if any use tunnels or any other engine to destroy the game; and after verdict for the plaintiff the Court must intend, that the jury thought a gun an engine to destroy the game; and so it was resolved in this Court between *Blewit quitam*, &c. ver. *Needs*.

But here the declaration saith the defendant used a certain engine called a gun, which is not so strong as the case of *Blewit* and *Needs*.

Thirdly, the plaintiff does not alledge, that the defendant was not qualified by the laws of this realm, but that he was not qualified by law to *Hunt*, though not qualified by the statute law; which is in the negative, that not having such an estate he shall not be qualified.

Sed non allocatur; for the words may well import as much as being unqualified, or not qualified.

Fourthly, That in the third count the plaintiff declares, that the defendant kept and used a dog to kill the game, without saying what sort of a dog; it might be a mastiff dog, or lap-dog, which might chance to kill game; and the statute 4 & 5 Annæ, 14. upon which this action is founded, mentions only greyhounds, setting dogs and lurchers.

And therefore the action for the penalty given by this statute ought to conform to it, and shall not be extended by equity, being a penal law. [578]

And though the statute 22 and 23 Car. 2. cap. 25, mentions dogs generally, and that be confirmed by this statute, yet it doth not give the penalty of 5l. to every thing forbidden by that statute, wherein the penalty is 20s. only. And of this opinion was the whole Court.

Fifthly, It was excepted, that the two last counts alledge the facts against the form of the statutes; whereas there is but one statute against exposing hares, &c. to sale.

But the Court took no regard to this exception, for there are several acts about hares, &c. And the statute 9 Annæ relates to this matter.

But for the fourth exception the judgment was arrested.

Fawcett

Case 250 *Fawcett ver. Strickland & al.* In C. B. Intr.
Pasch. 10 Geo. 2. Rot. 383 and 384.

Right of
common
of pasture
will not hin-
der the
lord's im-
provement
by inclosure,
leaving suf-
ficient com-
mon for the
tenants of
the manor.

TRESPASS for chasing his cattle.

Defendants plead that the defendant *Strickland* is lord of the manor of *S.* in which are several large wastes; that he improved 700 acres of one of those wastes called *Blew Castle Common*, leaving sufficient common for the tenants of the said manor; that the plaintiff put his cattle into the part he inclosed, and so with a dog chased them out, which is the same, &c.

Plaintiff replies, That he is tenant of the manor and hath right of common of pasture for all commonable cattle levant and couchant on his tenements there in the said waste, and likewise the plaintiff hath common of turbary in the said waste, so that inclosure is unlawful.

[579] Defendants demur, and shew for cause the replication was double, and doth not deny or confess that there was not sufficient common left.

As to the causes shewn for demurrer, they are of no regard, for the replication means not to insist on double matter, but the mention of the right to common of pasture is to introduce the claim of common of turbary, which is insisted on as an argument why such common of pasture is not within the statute of *Merton*.

So the whole question is, Whether a man having common of pasture and common of turbary in the same waste, Whether the Lord cannot improve the common by virtue of the statute of *Merton*?

It is sure common of turbary or piscary is not within statute. 2 Inst. 87.

But here the action is for chasing cattle put into the waste to use his common of pasture; then although the same plaintiff has common of turbary, that will not hinder the Lord's improvement, for they are distinct rights. And Hill 11 Geo. 2. Judgment was for the defendant's by the whole Court.

Case 251

Pardo ver. Fuller. In C. B.

In an action
on a pro-
missory note
against the
indorser,

ACTION on a promissory note against the indorser.

At trial before Chief Justice WILLES at *Guildhall* it was doubted, whether the plaintiff ought not to prove a de-

man

mand of the drawer before the action brought ; the matter on proof was left to the jury, whether a demand was made, or not.

On motion for a new trial, Judge FORTESCUE mentioned the case of *Davies and Mason*, 1 Geo. 2. in Common Pleas, wherein it was agreed by the Court, that there ought to be a demand of the drawer, for the indorser undertook conditionally only if the drawer did not pay.

Indeed if a note be forged, Chief Justice *Holt* held the indorser liable though no demand.

And indeed no demand can be, for when a note is forged there is no drawer.

So on a note payable to a man or bearer, no demand need be from him to whom it is made payable.

But a new trial was denied, for the evidence of the demand was left to the jury, who were the proper judges of that fact, and knew best the course of dealing.

there ought to be evidence of a demand upon the drawer, but that is a fact to be left to the jury.
Str. 699, 1087.

[580]

Anonymus.

Case 252

MOTION to amend the declaration delivered and the award of the Court thereon.

Lond. was in the margin, the fact was laid at *Tame* in the county of *Oxford*, but the award of the *venire* was to the sheriffs, and went to the sheriff of *Oxford*, and was tried by a jury of the county of *Oxford*; and after verdict it was insisted, this was a mis-trial; for being laid in *London* (for *London* is in the margin) and the award of a *venire* being to the sheriffs, there being but one sheriff unless in *London*, it must be intended to the sheriffs of *London*, and then the sheriff of *Oxford* had no authority to return the jury.

But by the Court, award was amended, for by the statute 8 H. 6. cap. 15. a letter too little or too much is amendable, and an award of the Court may be amended.

So *Viscomiti Lond. Præcipimus tibi* instead of *vicecomitibus Lond. præcipimus vobis* was amended.

Viscomiti Lond. præcipimus tibi instead of *vicecomitibus Lond. præcipimus vobis* held amendable after verdict.

[581]

Case 252 Green and Bridget his wife, relict of Thomas Dobson, *ver.* Roe. In C. B.

In dower,
plea of less-
see for years
ought not to
be received,
after plea
and judg-
ment for
demandant.

IN DOWER, the defendant pleaded that *Tho. Dobson* was seised in fee, and made lease to *John Caudle*, but did not shew when seised in fee, or that term was assigned to him, so it might be after coverture.

After judgment for demandant, *John Caudle*, claiming by lease for years from *Thomas Dobson* father of the demandant, prayed to be received.

Insisted by Serjeant PRIME, That judgment for seisin ousted the lessee, and he could not falsify the judgment till aided by the statute of Glo. 11. which extended only to recovery by default on collusion.

Co. Lit. 32,
a.
Pg. on rec.
162.
Lut. 733.
1 Salk. 254,
276.
1 Leon. 92.

But this was helped generally by stat. 21 H. 8. 15. Vide Cro. El. 565. Noy 64. 3 Lev. 168. Winch. 80. 1 Keb. 678. pl 7. Lilly's Pract. Reg. 669. Termor was received. 14 Car. 1 Salk. 291.

The writ of seisin requires delivery of actual possession, so does livery, and consequently the lessee will be ousted.

Serjeant DRAPER *contra*: First this is not a case within statute of Glo. 11. which extends only where judgment is by default, or on render, or *nient dedire*, 2 Inst. 325. and not to feint pleader.

Then the statute 21 H. 8. 15. only enables the termor to falsify, as lessee for life might after judgment, which shews it must be after judgment; and tenant for life after recovery may falsify by entry, by action, or by writ of disceit. F. N. B.

[582] Secondly, Stat. 21 H. 8. 15. enables to falsify only after judgment; the cases Cro. El. &c. were on judgments by default, which was by virtue of stat. Glo. 11.

Thirdly, This is a dilatory plea, 2 Inst. 322. and therefore not to be received by statute 4 & 5 W. 3. It is in nature of plea after *Darrien continuance*, and the party can have but one such.

Fourthly, The plea ought not to be received without affidavit to verify it; for tenant in dower cannot counterplead, nor can he shew lessee paid. 2 Rol. Ab. 444. §. 6, 7.

The

De Term. S. Trin. 11 Geo. 2.

The COURT : No receipt could be by common law ; by Stat. Glo. Receipt of lessee is allowed only on judgment for demandant, only staid by the Court till this matter was considered.

By stat. 21 H. 8. 15. Remedy given is after judgment, and termor is enabled to falsify, as lessee could do so, which was not by receipt, for he might falsify the recovery.

But this is not properly a dilatory plea ; so the lessee was not admitted to be received.

Cockerel *ver.* Armstrong & al.' In C. B. Case 254

TRESPASS for taking and impounding a gelding at Scarborough. Where interest is in land, or claimed out of it, the plaintiff cannot reply *de sua propria*, but ought to traverse the right.

Defendants plead, that the place where the gelding was taken is called *Weapness*, containing 1000 acres in Scarborough, of which the bailiff and burgeses of Scarborough were seised in fee, and the defendants as their servants, and by their command, took the cattle damage-feasant.

To which the plaintiff replies *de injuriâ suâ propriâ* generally. [583]

To which defendant's demur, and shew for cause, that the plaintiff did not traverse. Doct. pl. 114.

And judgment was given for the defendants. 2 Leon. 87.

First, Because several things are put in issue, which is a reason in *Crogate's* case, 8 Co. 67, a. 2 Ed. 4. 6. b.

Secondly, Because where interest is in land, or claimed out of land, the plaintiff cannot reply *de injuriâ suâ propriâ*. 4 Co. 71, b. 9 Co. 25. a. Co. Litt. 260, a.

Sir Archibald Grant *ver.* J. Gordon Ar. In Scacc'. Case 255
Hil. 8 Geo. 2 Rot.—

DEBT on a bond dated 11 Nov. 1730, in the penalty of 12000l. defendant after oyer of the bond and condition, which was to pay 6963l. 3l. 3s. 3d. on the 15th of May next, pleads, Usury, what shall be so. 5 Co. 69.

That before the making the said writing, viz. 11 Nov. 1730, William Gordon, bart. was indebted to the plaintiff in the sum of 6963l. 3s. 3d. and Sir Archibald Grant the plaintiff was indebted to the said Sir William Gordon, (co-obligor in the said bond with the defendant, who was his son) in the sum of 500l. received to his use, and being 4 Leon. 208. 1 Atk. 250, 301, 312. 1 Will. 206. 3 Atk. 278. 3 Will. 391. 2 Lev. 7, 8. Cro. Jac. 252, 507, 508, 509, 678. 10 Hawk.

K k

De Term. S. Trin. 11 Geo. 2.

P. C. 207, so indebted *eadem die* it was corruptly agreed contrary to
 sec. 15. the statute of usury, that the plaintiff should forbear and
 Carth. 67. give day of payment for the said 6963l. 3s. 3d. till the 15th
 Noy. 151. of May following, 1371. and that for such forbearance the
 741. plaintiff, without any payment, satisfaction or account,
 Anderf. 121. should have and retain the said 500l. then due, and Sir
 Cro. El. *William* should discharge him thereof; and for securing pay-
 27, 642, ment of the said 6963l. 3s. 3d. Sir *William* and the defend-
 643. ant should give the said bond; and that in pursuance of
 See stat. 12, such corrupt agreement the plaintiff gave day for payment
 Ann. st. 2. of the 6963l. 3s. 3d. till the 15th of May, and Sir *William*
 c. 16. and his son the defendant did execute the said bond, and
 3 Willf. 393. Sir *William* discharged the 500l. giving a receipt acknow-
 [584] ledging the payment of it, and discharging him from it
 2 Blac. rep. which without any payment, satisfaction or account, the
 861, 863. plaintiff still retains to his own use, which sum of 500l.
 Cowp. 172, exceeds the rate of of 5l. *per cent. per ann.*
 770. 793.
 1 Bulst. 36,
 37.
 Moor 398.
 1 Lut. 273,
 464.
 2 Stran. 1243. 5 Bac. abr. 411. 2 Burr. 715, 891. Cowp. 47. 1 Haw.
 C. p. 552. Noy 78. A bona fide bargain, not usury. 5 Burr. 2082.

Plaintiff by his replication traverses the corrupt agree-
 ment, and issue is joined thereon: and at a trial before
 Chief Baron REYNOLDS 27 Jan. 173—, the jury found
 specially, that before the making of the said writing, viz.
 11 Nov. 1730, Sir *William* was indebted to plaintiff
 6963l. 3s. 3d. and the plaintiff to him in 500l. for money
 received to his use; and being so indebted, it was agreed
 between plaintiff and Sir *William*, that the plaintiff should
 give day for payment of the said 6963l. 3s. 3d. till
 May next, and for forbearing the said sum for the time
 and till the day last mentioned, the plaintiff, without pay-
 ment, satisfaction or account, should have and retain the
 said 500l. to his own use, and Sir *William* should discharge
 him from it; and that for securing the said 6963l. 3s. 3d.
 Sir *William* and defendant should give bond in penalty
 12000l. with condition *ut supra*, and at the same time
William should assign to plaintiff a mortgage of lands
 Kent, and two Scotch bonds, as a farther collateral se-
 curity for the same sum; that in performance of the said
 agreement plaintiff gave such day of payment, and retained
 to his own use the said 500l. without payment, and the
 said Sir *William* discharged him of it, and gave receipt
 it; and for securing the 6963l. 3s. 3d. Sir *William* and
 defend

pendant executed the writing in the declaration, and Sir William assigned the said mortgage and two Scotch bonds as a farther collateral security, and that the said 500l. is above the rate of 5l. *per cent. per ann.* but whether on the said matter it was corruptly agreed *prout*, they reserve to the Court, &c.

Upon this special verdict, it was insisted this verdict was for the plaintiff. For,

[585]

First, The jury do not find the same contract that was pleaded.

Secondly, The contract as found is not usurious.

As to the first point, it was argued, that the contract found is variant from the contract pleaded, which saith, plaintiff in performance of his corrupt agreement agreed to give the bond on which the action is brought; the jury find, he agreed to give that and three other securities, viz. an assignment of a mortgage and two Scotch bonds. The contract is entire, and the whole ought to have been shewn, that the Court may judge of it, and that a recovery or bar in this action may be pleaded to another action that may be brought on the bonds assigned.

If plaintiff declares in debt on contract for sale of a horse for 40s. and jury find contract was for sale of two horses for 40s. it is a different contract. 2 Roll. Abr. 702.

So in debt for 20l. if jury find debt for 40l. or two marks. 2 Roll. Abr. 703.

In assumpsit for two things, if jury find the undertaking was only to do one of them. 2 Roll. 707.

So if usurious contract is pleaded with one, and jury find it made with two; to which it was answered, *modo & forma* goes to the substance of the plea only. Co. Lit. 281. 2 Roll. Ab. 705. pl. 58, 61.

As to the second point it was insisted the contract found is not usurious; for first it is not found for what time the forbearance was, but only till the 15th of May; and though the agreement is made 11th of November, yet the money being due before, it might be from a distant time before the time alledged; being after a verdict does not ascertain any thing.

[586]

If agreement appears not to the Court usurious, the Court will not construe it such. 2 Cro. 507.

De Term. S. Trin. 11 Geo. 2.

If by mistake agreed to be paid the day after, it shall not be void. 2 Cro. 677. Cro. Car. 501. 1 Sid. 285. Vide 3 Mod. 35.

It is but discharging a debt, which is a chose in action, and might never be paid; and the statute saith, reserving or taking above 5l. *per cent.* here is no loan, and there is a difference between *interesse lucri*, and *interesse damni*. Vide Lut. 271. Comb. 133. 1 Sid. 421. And afterwards in Trinity term 1738.

REYNOLDS Chief Baron, CARTER and FORTESCUE Barons, *contra* THOMSON Baron, gave judgment for the plaintiff.

Term. Sanct. Mich.

11 Geo. 2.

7th July 1738, *Ante hunc terminum recepi literas patent' Domini regis geren' dat' eodem die constituent' me fore capital' Baron' scaccarii sui.*

Speed, and Sarah his Wife Administratrix of Ander- Case 256
son her former Husband, *versus* Martin. In Scacc'.

BILL to have a note of 30l. given by *Anderson* to the defendant delivered up, and an injunction to stop the defendant's proceedings at law and in the spiritual court. Answer falsified by one witness sent to a trial.

The case was this:

Anderson the intestate borrowed of the defendant at several times 70l. for which he gave a note for 40l. dated in May 1732, and a note for 30l. dated in May 1735; on the 23d of July 1735 an account was settled, and 20l. having been before paid and indorsed on the 30l. note, the plaintiff insists that *Anderson* then paid more 55l. in full of principal and interest on both notes, and the 40l. note was delivered up, and the defendant not having the 30l. note then with him, he promised to deliver it as soon as found, and gave a receipt for 55l. in full of both notes and all demands. But *Anderson* dying the 20th of July following, the defendant put the 30l. note in suit, and then stopping that suit proceeds in spiritual court to obtain administration as principal creditor.

[588]

By his answer the defendant swears that on the 23d July he received only 44l. in satisfaction of the 40l. note and interest, which was delivered up, and proved by one witness that *Anderson* said a few days before his death, that 11l. or 12l. was still due to him; on which it was insisted for the defendant,

defendant, that the plaintiff's bill ought to be dismissed, since the defendant had denied the equity of the bill, and the plaintiff had not proved the payment of 55*l.* save by one witness, his servant, who swore that he saw the 55*l.* paid, and the receipt produced was read over to him, and he set his mark to it. And one witness is not sufficient to found a decree against the defendant's oath.

It was insisted for the plaintiff, that the bill was proper since the defendant was vexatious, having begun a suit on which the matter might be tried, and then suing in the ecclesiastical court; and bills for peace were usual, and to have bonds or notes delivered up that were satisfied; and here besides the one witness that is positive, there is the defendant's receipt under his hand, which he denies only as he remembers and believes; and as to *Anderson's* declaring 11 or 12*l.* due, we can prove his declaration to the contrary.

Per cur'. *Anderson's* declaring he owed nothing is no evidence, for he cannot take advantage of his own declaration, and one declaration he did owe money, is of more avail than twenty declarations to the contrary; that the bill was not improper, since the defendant would not proceed in the action wherein the fact might be tried, but affected to get the administration to himself; let therefore the bill be retained; but in case the defendant is willing to try whether the 10*l.* is due, or not, he shall have liberty to do it, since there is but one witness in effect against his oath; he is positive that he paid but 44*l.* the witness is as positive that he paid 55*l.* let that be tried before the end of next term, and the bill retained till that time, and in the mean time an injunction to stop the proceedings at law and in the ecclesiastical court.

[589]

Vide 2 Vern. 283, 554, *Christ's College in Cambridge* versus *Widdrington*; on hearing 25 Feb. 1692 before *Rawlinson* and *Hutchins*, lords commissioners, the cause was referred to an account, and as to one article of the account there was but one witness against the defendant's oath. *Et per cur'*: It was not sufficient evidence to decree against the defendant. And the plaintiff having had the benefit of a discovery on the defendant's oath, we will not send it to be tried at law where one witness is sufficient, though insisted by defendant's counsel that it might be tried at law.

Note; This was only in respect to one article on the account before the master; and the plaintiff had before the benefit of the decree, an account and discovery from the plaintiff.

4 Nov. 1738.

Bill of revivor lies not by assignee of the clerk of the peace

BILL of revivor by plaintiff, assignee of the clerk of the peace, to whom the effects of one *Bowman*, discharged as an insolvent debtor by virtue of the statute of 2 Geo. 2. 22. were assigned and transferred for the benefit of his creditors; *Bowman* had exhibited his bill in this court to be relieved against securities entered into by him to the defendants; and the defendants having answered *Bowman*, who was a prisoner, was discharged by virtue of the statute for relieving insolvent debtors, and all his effects, pursuant to the direction of the act of parliament, transferred to the clerk of the peace for the county of *Middlesex*, who made an assignment of them to the plaintiff, who thereupon brought a bill of revivor to revive the proceedings in the original suit brought by *Bowman*; and the defendants, as to so much of the said bill as desired to revive these proceedings, demurred; and it was insisted for the defendant that the plaintiff could not revive, there being no privity between *Bowman* and him, and it was the constant course that the assignee or devisee could not revive, but must proceed by original bill, which was indeed in nature of a bill of revivor. It is plain he could not do so, unless he could do it by virtue of the statute; but the statute S. 8. vested the property of *Bowman's* effects as fully as in assignees of a commission of bankrupts. But assignees of a commission of bankrupts could not bring a bill of revivor, but must sue by an original bill, which was daily experience. And of that opinion was the court, and the demurrer allowed.

[590]

It was likewise objected against the bill of revivor, because such bill can only revive the former proceeding; but here was new matter of fact, which required new answer and examination, and therefore improper to have it inserted in a bill of revivor. But as to this the court gave no opinion; and possibly if the plaintiff is proper to have a bill of revivor, it will be necessary he should insert so much new matter as is needful to shew how he comes entitled to revive.

Joseph

Case 258 Joseph Milles *versus* Mat. Davies, Evan Watts and Selby Price, *alias* Rees. In Scacc'.

Sheriff may justify by grant of a replevin, without shewing the property of the goods to be in the plaintiff.

[591]

TRESPASS for taking two bullocks, &c. of the plaintiff. The defendant, as to all but the taking the said bullocks, pleads not guilty; and as to the taking them he justifies, for that before the taking, the other defendant *Evan Watts* came before him, then sheriff com' *Randor*, and made his complaint against the plaintiff in a plea of taking and unjustly detaining the cattle, and found pledges to prosecute the said plaint, and to return the cattle, if a return should be adjudged, and prayed a warrant to replevy the same; whereupon he made his precept to the other defendant S. P. his special bailiff, to replevy the same; and the plaintiff should appear at next county-court to answer the said *Evan Watts* in the said plea; which precept, before the return and before the taking, he delivered to the said *S. Price*, who by virtue of it, at the time and place in the declaration, took the cattle, and the plaintiff not claiming property, delivered them to the defendant, and summoned the plaintiff to appear at the next county-court, to answer *Watts* in the said plea, for taking and distraining his cattle, and then returned his precept executed as aforesaid, he being sheriff at taking and return of precept, which is the same taking, &c.

The defendant *Evan Watts* pleaded not guilty generally.

Defendant *Selby Price*, as to all but taking, pleads not guilty, and as to that justifies by virtue of the precept *supra*.

The plaintiff demurs to both pleas, and shews for cause, That the defendants do not alledge that the cattle were the proper cattle of the said *Evan Watts*, or that he claimed property or title to them, or that they were in his possession, or shewn by him to the sheriff or bailiff, or were distrained by the plaintiff out of his possession.

Secondly, That the plea doth not mention what pledges by name were found.

Thirdly, That it is not alledged plaintiff had notice of the plaint or replevin.

Fourthly, That the plea amounts to the general issue.

The defendants join in demurrer.

As to the first cause of demurrer, the defendants who justify are officers, who cannot know in whom the property

of

of the cattle is. By stat. Marl. 5th Hen. 3. 21. *Si averia capiant' vicecomes post querimoniam sibi fact' deliberare possit*; and therefore it is agreed, that it becomes the sheriff's duty upon such complaint by parol, or by precept to his bailiff, to replevy them. Per Litt 9 Ed. 4. 48. b. F. N. B. 69. E. 2. Inst. 139. And such precept may be given before any county-court. Co. Lit. 145. b. It is true, such complaint ought after to be entered; but who is to enter it? He that makes the complaint, not the sheriff; if then the plaintiff does not enter it, shall his neglect subject the plaintiff to an action? The sheriff might lawfully make such precept before the plaint entered; suppose he does so, and the party, from whom the cattle are taken, before the next county-court brings his action, shall he be liable to it for doing what he lawfully might and ought to do?

In case the person from whom the cattle are taken hath property, the law gives him a proper remedy; if he claim property before the sheriff, he must return it, and on such return a writ *de proprietate probandâ* issues; and if found for the claimant the sheriff can proceed no further. Co. Litt. 45. Dyer 173. But if the plaintiff had property, and admitted to claim it before the sheriff, he might plead property in himself or in an estranger, either in abatement or to bar. 2 H. 6. 14. 9 H. 6. 39. b. 29, or 39 H. 6. 35. R. Cro. El. 475. 1 Salk. 5, 94. and many other books. Now here the plea expressly saith, that the plaintiff claimed no property before the sheriff, and that he was summoned to answer the other defendant *Evan Watts* in a plea of taking and detaining his cattle, whereby although he did not make his claim before the sheriff, he might have appeared and insisted on it by plea.

As to what is said, that the sheriff doth not shew by his plea, that the defendant *Evan Watts* was possessed of the cattle, or had distrained them; the sheriff had no authority, and consequently no cause to inquire into the defendant's right or title to the cattle; if the plaintiff had claimed property, he could not have determined it without a writ of *proprietate probandâ*, and upon such writ, if it had appeared that said *Watts* had no property, though he had possession, he could not have replevied the cattle.

As to the second cause of demurrer, that the plea doth not allege what pledges are found, and who by name. It is true, in replevin by writ the sheriff must take pledges, and those pledges are liable; for if a return be adjudged, and

(592)

2 Cro. 519.
Carth. 243.
Holt. 562.
Winch. 26.
Show 400.
402. 2 Ld.
Raym. 984.
6 Mod. 81.
Mod. cat.
69. 103.
2 Roll. rep.
69. L. II.
Ent. 353.

[593]

and the cattle not returned, a *scire facias* lies against the pledges; and if the sheriffs returns *nihil*, a writ shall be sued against him to answer the value of the cattle. 2 Inst. 340. Co. Lit. 145. And therefore if the sheriff doth not take pledges in replevin by writ, it is error. Resolved Cro. Car. 594. And an action on the case lies against him for his default. Resolved Cro. Car. 446. And therefore in such case there might be reason the sheriff should shew what pledges he hath taken. But in a replevin by plaint the sheriff is not bound to take pledges. Resolved Cro. Car. 594. And therefore his omission to take them is not error. Resolved Jon. 439. Yet if the sheriff doth take pledges, *scire facias* lies against them, if the cattle be not returned. Resolved 3 Mod. 57. Resolved in C. B. H. 3 Geo. inter *Mulso* and *Sheers*. But whether the sheriff was obliged to take pledges or not, what need hath the defendant to shew forth the names of the pledges in his plea? for the defendant only justifies the taking of the cattle, which the plaintiff claims to be his, because he was sheriff of the county of *Randor*, and as such was bound to give replevins *super quod rimon' sibi fact'*, and he did so accordingly; and being required by stat. W. 2. to take pledges on granting such replevin to make return as well as to prosecute, he saith he did so, whereby the plaintiff was secure of having his cattle again if a return should be adjudged; but who those pledges were is not at present material, since here appears as yet no cause why a *scire facias* should be awarded against the sheriff.

As to the third cause of demurrer, it is expressly said in the plea, that the precept required the officer to summon the plaintiff to appear and answer the other defendant *Edwards Watts* at the next county-court in a plea of taking and detaining his cattle, and that *Selby Price* the officer summoned him accordingly; what other notice should the sheriff give of such plaint or replevin?

[594]

As to the fourth cause of demurrer, that the plea amounts to the general issue, it does not appear but that the plaintiff may have the property of the cattle for which this action is now brought. It is admitted, that the plaintiff had possession of them, and that upon the defendant *Davis* command they were taken out of his possession by the other defendant *Price*, and consequently if they had pleaded guilty, the plaintiff must recover; for it had been sufficient for him to prove that the plaintiff had the cattle in his possession, and the defendant took them, unless the defendant

could show some matter to justify or excuse the taking; but such justification or excuse must be pleaded, and could not be given in evidence upon not guilty.

In case of *Holler and Busb*, Pasch. 9 W. 3. in B. R. 3 Lev. 41. Cro. El. 88, 262. 2 Salk. 580. 5 Mod. 252. Carth. 380. Skinn. 674. 3 Salk. 272. Case in B. R. 120. 1 Ld. Raym. 218. Dougl. 463. 434.

Salk. 394. Trespass for a horse, the defendant pleaded that the bishop of *Sarum* had right to grant replevins in such a manor; that the horse was A's. and the plaintiff impounded him, and the defendant took him by virtue of a replevin; it was held very rightly, the plea amounted to the general issue, for the plea admits no property or possession in the plaintiff, and consequently he had no colour of action, for by the plaintiff's taking and impounding the horse, the horse was not in his possession, but in the custody of the law, and consequently no justification needful.

If said the plea admits the property in the plaintiff, and then the cattle could not be taken from him by a replevin without shewing some cause for it, 'tis tantamount, as to say, the sheriff ought not to grant a replevin, unless the party praying it hath just ground of action. But what authority to examine into or determine that point? If the party who hath the cattle claims property, the sheriff cannot determine it without a writ *de proprietate probandâ*; and then if the property be found for the party claiming it, it is but an inquest of office, and the party who made the plaint may after sue a writ of replevin, to which property may be again pleaded. 7 H. 4. 46. a. Co. Lit. 145. b.

And this appears, *Minos and Soleby*, Trin. 23 Car. 2. in C. B. 2 Mod. 242. Trover for taking his sheep; the jury found A. agreed to depasture his sheep with B. for some time, and then if B. would give such a price he should have them before the time; A. sells them to the plaintiff, B. afterwards sells them to C. who brought a replevin for them, and the defendant, his servant, in assistance of the sheriff's officer, drove them to his master's ground, and though the plaintiff demanded them, refused to deliver them. And tho' the court held the property was in the plaintiff, yet gave judgment for the defendant, for he entered in execution of the legal process, which is a justification to him as well as the officers.

These things occurred on reading the paper-book, but it was again argued by serjeant DRAPER for the plaintiff, and Mr. BOOTLE for the defendant.

Serjeant DRAPER insisted, that the plea was ill, for it ought to have shewn that *Watts* who sued the replevin had property

property in the goods replevied; for although the defendant *Davis* be an officer, he ought to shew he had authority to take the goods, and that his authority was duly executed; now his authority is by stat. Marl. which requires *si averia alicujus capiantur & injuste detineantur vicecomes redeliberare possit*; so there must be a person whose cattle are taken, there must be an unlawful taking, otherwise the sheriff hath no authority. *Watts* appears not to have any right to the cattle, or that he so much as claimed the property of them; the plea should say they were *averia sua*; so it was in *Hallet* and *Birt's* case, Carth. 380. 5 Mod. 248, 252. though the court indeed gave no judgment as to that point. So Reg. 81. Therefore in trespass, a replevin pending for the same trespass is a good plea. Bro. Tresf. 48, 251, 252, 271.

Secondly, The party ought to shew the cattle to the sheriff, till when he is not bound to replevy them; for it is a good return *quod nullus venit ex parte quer' ad monstrand' averia*. Dal. 277. Kelw. 119. b. So the sheriff should not return till the *pluries*, till then he is excused, on the *pluries* he may return the claim of property, till such return the writ *de proprietate probandâ* lies not, for it recites the *pluries*. Reg. 83. a. 85. b. and such writ must be brought by the plaintiff in the suit, for it cannot be by a stranger. Co. Lit. 195. b. 2 Rol. Abr. 481. 14 H. 4. 25.

[596]

If the sheriff be shewn a stranger's goods, and take them, trespass lies against him. 2 Roll. 5:2. 5. b. And otherwise a stranger could not have remedy, though all his goods are taken away; and it would be the most mischievous thing possible, for the sheriff might strip a man's house, and he would have no remedy; he cannot have *proprietate probandâ*, because a stranger nor does it lie on replevin by plaint. Fitz. *proprietate probandâ*. 4 Dal. 436. Reg. 83. Th. Br. 170.

Thirdly, The defendant ought to have shewn when the county court was held; for otherwise how could the plaintiff, against whom the plaint was sued, know when or where to appear?

In inferior courts it is not enough to say, that the party is adjourned to the next court, unless it be likewise shewn at what time and before whom such court is to be held.

De Term. S. Mich. 11 Geo. 2.

In answer to which it was argued, that it lay not in the knowledge of the sheriff in whom the right of the cattle replevied was; and if he should say that the property of the goods did belong to *Evan Watts*, it would make the plea amount to the general issue, as was held in the case of *Dale and Philipson*, 2 Lutw. 1372.

Upon which the court inclined to think the plea was good notwithstanding the objections insisted on; but as many cases had been cited by the counsel, time was taken to consider them to a further day in the same term, when I delivered the judgment of the court for the defendants.

[597]

Term. Sanct. Hill.

11 Geo. 2.

Case 259

Roe *ver.* Sir John Moore, Bart. In the Exchequer Chamber.

28 January.

Error in
fact not as-
signable in
the exche-
quer-cham-
ber.
Ld. Raym.
151.

ERROR of judgment in B. R. in an *assumpsit* for 40l. for the occupation of an house, and for lodgings and necessaries found by the plaintiff for the defendant and his servants. On *non assumpsit* pleaded, the jury found for the plaintiff, and gave 8l. damages; and judgment was given for the plaintiff.

On 11 Feb. 11 Geo. 2, which was in Hil. Term. following, the plaintiff in error comes in proper person before the justices of C. B. and barons of exchequer, and assigns for error, That it appears by the record, that in East term 10 Geo. 2. he defended and pleaded to issue in B. R. by *Richard Ednel* his attorney, whereas he was then an infant under the age of twenty-one years.

Defendant in error pleads *in nullo est erratum*, and prays that the judgment be affirmed.

In this case it was agreed, that it was error for an infant to appear by attorney, for he ought to appear by guardian. But the question in this case was, whether this being an error in fact was assignable for error in the exchequer-chamber, which sat only by virtue of the statute 27 Eliz. c. 2. And, Mr. ROBINSON insisted that it was; and so it was resolved Cro. El. 731. and so again 2 Cro. 5. where the justices and barons agreed, (except *Anderson* Ch. J. that it might be assigned; and the defendant pleading that he was at full age, a *nisi prius* was awarded under the exchequer-seal, chief justice ANDERSON refusing to seal on which issue the jury found for the plaintiff in error, upon

[598]

which the judgment was reversed. It is true, when the record was remanded, it was moved in B. R. that they had proceeded in the exchequer-chamber without warrant of the statute to try error *in fait*, for the statute impowers them only to try errors in the record; and of that opinion were all the justices. But it is strange the justices of B. R. whose judgment was reversed, should determine against the jurisdiction of the court that reversed it. These cases were M. 41 & 42 El. the first was *Price's* case, wherein the death of the party before judgment was assigned; and other was, that of *Rowe and Lord*, wherein the error assigned was, that the plaintiff being an infant sued by attorney, when he ought to have sued by guardian or *prochein amy*, (which at that time was error, though it be since helped by the statute 21 Jac 13. after verdict.)

But afterwards the same error was assigned, that one of the defendants appeared by attorney being under age, upon a writ of error in the exchequer-chamber of a judgment in B. R. and the judgment was reversed. 2 Cro. 303. *King ver. Merborough and Crakes*.

So in error of a judgment in B. R. in ejectment, it was assigned for error, that the lessor was seised in right of his wife, who died before judgment; although the death of one, who was no party to the suit, was held no error, yet it was agreed in the exchequer chamber, that judgment might be reversed for matters of fact, as the death of the party, or the like, where the writ was absolutely abated. Hob. 5. *Wilkes and Fordon*, P. 9 Jac.

So in the case Cro. Car. 413. 1 Jon. 410. where the death of two of the defendants before verdict was assigned for error; it was moved, that this might be examined in B. R. but the court held it could not after judgment entered. Then it was considered, whether error in deed was assignable in the exchequer-chamber; because, as *Berkley* said, the statute gave power only to examine matters in law. But *BRAMSTON Ch. J. Jones and Crook*, held it was well assignable. And in the report notice is taken, that it was assigned in the case of *Row and Long*, 2 Cro. 5. and tried by *nisi prius*; and the like was H. 16 Jac. Rot. 75. and the like M. 10 Car. *Smith and Merchant*.

[599]

Serjeant *DRAPER contra* insisted, That by the statute 27 Eliz. the preamble recites, Forasmuch as erroneous judgments given in B. R. are only to be reformed by the high court of parliament, which court is not so often holden as
in

in antient times, neither in respect of the greater affairs such erroneous judgments can be well considered of and determined during the time of parliament; whereby subjects are greatly delayed of justice; therefore authority is given to the judges of the common pleas and barons of the exchequer, to examine, and affirm or reverse the judgments of the king's bench in the cases there enumerated; so that it is plain the statute intended to give a writ of error before the justices and barons only in cases where a writ of error lay before in parliament, and to prevent delay where the parliament were not frequently held. As therefore the parliament never examined into errors in fact, nor had any method to try them, (for it was never known that the parliament ever issued process for the trial of any matter of fact but only for errors appearing upon the record; so this statute gave the justices and barons authority only to examine and reform errors in and upon the record; nor was there any occasion for it; for errors in fact were before remediable, and still are by writ of error *quod coram vobis residet*. So that it seems an encroachment upon the jurisdiction of the court of B. R. for the exchequer-chamber to examine and try matters of fact, which is expressly provided against by the statute, and by the exception in the writ of error (other than such as are concerning the jurisdiction of the court of king's bench.)

[600]

The exchequer chamber can not admit to bail—or, examine errors in fact. Cro. Jac. 108. C. o. Jac. 5.

It is true, that this matter was not so fully considered at first, and therefore there was variety of opinions among the judges about it; and in *Price's case*, Cro. El. 731. it was held error in fact might be assigned, and tried; but yet they held they could not bail, or do any thing but examine the errors, which must be the errors in the record before them.

So in the case 2 Cro. 5. though the justices and barons held such error assignable, and triable by them, yet *Anderson* chief justice was of a different opinion, and so strong so, that he would not suffer the seal in his custody to be made use of to seal the writ of *nisi prius*. And therefore it is no wonder all the justices of B. R. declared against it and refused to grant restitution to the defendant, against whom there was an execution; which could only be on the foundation, that the exchequer-chamber had no jurisdiction in the case, and then the proceeding before them was null and void, as being in this respect *coram non iudice*.

The case Hob. 5. was only a bare admission of the court no judicial determination, for the judgment was not reversed.

De Term. S. Hill. 11 Geo. 2.

versed; so in the case in Cro. Car. 513. for it came before the court of B. R. only upon a motion to amend the record, by varying the entry of the death of two of the defendants after the last continuance, and making it to be before the verdict; although it was confessed by the other party to be as the entry was; but the court held such amendment could not be made after judgment entered.

Then it was started, how it could be helped? For as Berckly said, it could not be assigned for error in the exchequer-chamber; the other justices indeed on a sudden thought it might; but then when it came to be considered how it could be tried, they all doubted, and the matter was adjourned; and what became of it afterwards appears not.

But in the case of *Hopkins and Prior* ver. *Wrigglesworth*, 2 Lev. 38. 1 Vent. 207. where in error in exchequer-chamber of judgment in B. R. in trespass, death of one of the defendants before judgment was assigned for error, and *in nullo est Erratum* pleaded, which is a confession of the fact, yet the judgment was affirmed, for the exchequer-chamber hath nothing to do with errors in fact, which B. R. might have examined before the statute, and therefore the statute extends to no cases but such wherein there was no remedy before but in parliament.

So it was said in the case of *Ipsly and Tack*, that error in fact cannot be assigned in the exchequer chamber. 2 Mod. 194. That matter of form cannot be assigned, appears 1 Sid. 253.

The cause being adjourned till the next term, Hill. 1738, all the justices and barons agreed that error in fact could not be assigned, nor was it examinable in the exchequer-chamber, that *in nullo est Erratum* was in the nature of a demurrer to it, and that judgment ought to be affirmed; upon which it was moved that the plaintiff in error might discontinue his writ upon payment of costs, which was granted *nisi causa*, and afterwards made absolute; but afterwards in East. term 1739, upon affidavit that the costs were taxed, and had been demanded, and that the plaintiff in error refused to pay them, rule for discontinuing the writ of error was discharged; the cause was again put into the paper, and the judgment affirmed.

[601]

2 Mod. 194.
But see,
stat. 3.
Jac. 1. c. 8.
4 & 5,
W & M.
ca. 4. 13.
Car. 2. c.
9.

Vide Imp.
Pra. 532.
3 Cromp.
345. 1 Bac.
abr. 213.
in nis.

Case 260

Sir George Wynn *ver.* Bishop of Bangor.
In Scacc.

Where a
new trial
shall be
granted for
a misbehaviour in one
of the jury.

[602]

viour in one
of the jury.

IN Ejectment, on the demise of Sir *George Wynn*, for a piece of land in which a lead mine was discovered, after a verdict for the plaintiff it was moved for a new trial on several affidavits, shewing,

First, That upon the view granted in this cause, *George Wynn*, who was one of the showers for the plaintiff, gave evidence to such of the jurors as were upon the view, by arguing against the likelihood that the places shewn on the part of the defendant as the limits of their land should be the boundaries, because the names they bore might be given for such and such particular reasons.

Secondly, That one of the jurors declared at the view, that by what they had seen (before the shower for the defendant had shewn) they should soon determine the dispute.

And after, the day before the trial, he said, Sir *George Wynn* was a neighbour, and right or wrong he would give it for him; and for these reasons the court granted a new trial, although baron PARKER seemed to think that the words being known before the trial, and for them a challenge might have been taken against the persons being on the jury, that such challenge being omitted, it was not proper to alledge the matter as a cause for a new trial, and the case of *Tependen and Shaw* was cited for that purpose.

But the CHIEF BARON said he was counsel in that cause which related to a fishery at *Milton*, claimed by the lady *Catherine Herbert*, who was granddaughter to the duke of *Leeds*, and after a verdict for the lady at the assizes at *Maidstone* it was moved for a new trial, because the duke had sent letters to several of the jurors returned upon the panel, desiring them to appear at the assizes; but a new trial was denied, because the letter did not hint any thing more than a desire they should be there, although the chief justice HOLT expressed a dislike to such letters, which from a peer of such eminence, might be thought to have some influence on the cause, though nothing was said about it.

For attain
and new
trial on mis-
behaviour
of juror
vide C. o.
El. 779.
Noy 49.
171. 2 Inst.
557. Dyer
78. 1 Danv.
abr. 793.
pl. 1. 1
Roll. abr.
219. 2 Rol.
abr. 596.
pl. 6. Co.

Entr. 59. 2 Hal. H. P. C. 309. 1 Hawk. P. C. 146. 2 Lev. 139, 205. Freem. 414. P. 549. 2 Jones 83. Ante 525. Comb. 14. 1 Keb. 811. 3 Bull. 173. Vaugh. 151. 1 Burd. 274. 1 Stra. 642. 1 Term. rep. B. R. 11.

Hodgson *ver.* Atkinson. In Scacc'.

Case 261

PROHIBITION was moved for to the consistory court of the bishop of *Chester*, for that a libel was there exhibited, suggesting that by custom and constant usage the parishioners who had lands in the chapelry of the chapel of *Prescot Patrick* in the diocese of *Chester*, or the major part of them, used to choose or nominate a curate to officiate in that chapelry, and to pay him out of their lands a salary or pension for so doing.

Custom or prescription only triable at common law.

That *Atkinson* was duly elected by the major part of the parishioners to be curate there, and had entered a *caveat* in the usual form against any other's being admitted curate; that notwithstanding such *caveat*, the bishop granted a licence to *Hodgson* to officiate as curate there, although it did not appear that he was in holy orders, and upon a suggestion that they proceeded to examine this custom, although customs and prescriptions were triable only at common law, a rule was made for a prohibition, *nisi*, &c. And now upon shewing cause it was insisted, that this libel was not intending to examine or controvert the custom but only to examine the validity of the licence to *Hodgson*, pending a *caveat*, and when he was not in holy orders, of which they have the proper jurisdiction; which was admitted, and so a prohibition only *quoad* the trial of the custom.

Croft *ver.* Powell & al'. In Scacc'.

Case 262

BILL to redeem a mortgage made by *Rouse* to *Baldwin*, and by him assigned to *Gabriel Powel*, father of *John Powel* the defendant; and upon the opening the bill and answer and reading the depositions, the case appeared to be this; *Robert Rouse* seised in fee of lands in com' *Brecon* by lease and release 16 and 17 January 1703 conveyed them to *John Baldwin* and his heirs, and by a defeazance bearing date with the release and executed at the same time, it was agreed that if *Rouse* should repay 1000l. borrowed of *Baldwin*, and likewise two other debts borrowed of other persons, and which *Baldwin* took upon him to pay off, amounting together to 2200l. within the space of one year from the date of the indenture, then *Baldwin* should recon-

Mortgagee with power to sell, sells with notice of mortgage without mortgage, his estate redeemable.

[604]

vey to him; but if he failed to pay that money within the year, then *Baldwin* should mortgage or absolutely sell the same lands, free from redemption, and out of the money raised by such mortgage or sale pay the said 2200l. and interest, and be accountable for the overplus to *Rob. Rouse*, and his heirs.

That after the said *John Rouse* borrowed several other sums of money, some of which were paid off by *Baldwin*, who took several assignments of their securities in trust for himself; and in particular in the year 1710, he confessed a judgment for the sum of 578l. for securing a bond-debt of that penalty, *John Ridhouse*, to whom Sir *John Morgan* is administrator with the will annexed, being his grandson, and in 1712, made a mortgage to the plaintiff for securing 695l. which mortgage was made by lease and release, dated 19 & 20 Apr. 1709, but, upon a trial at law for that purpose, were not found to be executed till 5 July 1712.

By articles of agreement *inter John Baldwin* of the first part, *Richard Knight* of the second, and *Gabriel Powel* of the third part, dated — the said *John Baldwin* agrees for 4300l. to convey this estate to *Gab. Powel* and his heirs, and to warrant the same to him and his heirs, except as therein after excepted, and covenants he had full power to convey, except as is excepted, and in such exception the said defeazance is mentiened.

And afterwards by indenture of lease and release, dated 25 & 26 Mar. 1716, *J. Baldwin* conveys to *Gab. Powel* and his heirs, to the use of him and his heirs, and in such conveyance the said defeazance is mentioned and excepted; and *Baldwin* therein covenants, that the sum of 4400l. was then due to him upon the said mortgage; and by *Henry Williams* his deposition it appears, that at the grand sessions at *Brecon* in *Wales*, Anno 8 Ann. a fine was levied of the same lands and tenements by *Rob. Rouse* and *Susan* his wife, to *John Baldwin* and his heirs, but the deed leading the uses of such fine does not appear; and that *R. Rouse* was privy and consenting to the said agreement made by the articles aforesaid *inter John Baldwin* of the first, *Richard Knight* of the second, and *Gab. Powel* of the third part, and that *Baldwin* being in possession presented to a benefice belonging to that estate when it became vacant.

That 1719, *Gab. Powel* exhibited a bill in this court against *Rouse* and his wife, and their daughter *Ja. Baldwin*, and other incumbrances, praying to be quieted in the possession

session of the said estate; or if the court should decree h's estate to be redeemable, that *Rouse, &c.* might redeem by a short day, or otherwise might be foreclosed.

Upon this *Rouse* exhibits a cross bill, praying to redeem; and *Gab. Powel* by answer to such cross bill insists, that *Rouse* having conveyed to *John Baldwin* and his heirs *ut supra*, by lease and release 1708. and having borrowed more monies, and neglected to pay interest to *Baldwin* and others for two years, and the annual profits not answering the interest by 40l. *per annum*, in order to bar the wife's dower, without which he could not be able to meet purchasers, a fine *sur consance de droit* was levied at the great sessions in *Wales* 10 Ann. upon which *Baldwin* took upon himself to be absolute owner, and treated with several for the absolute sale of the premisses.

That after six years possession the defendant *Gab. Powel* treated with *Baldwin* for the absolute purchase in Aug. 1716, and agreed with him to purchase the estate for 4300l. and entered into the articles *supra*, and took an assignment of a mortgage to *Knight*, and paid him 2200l. and paid *Baldwin* 350l. and agreed to pay him 1750l. more; that while the agreement was writing he was shewn the defeasance, and *Baldwin* desired it might be taken notice of in the articles; which was done, on his assuring 4400l. was then due to him upon the said estate.

That in Mar. 1716, *Baldwin* conveyed to him and his heirs, by which he thought to have had an absolute estate; but *Baldwin* acting under the power in the defeasance, insisted to have it mentioned, and it was so; and he fearing he might be accountable to *Rouse* for the overplus above what was due to *Baldwin*, made him covenant that 4400l. was then due to him; that nine months after *Cotten* asked if he had paid all the money, and he confessed he had 1300l. still in his hand, which *Cotten* advised him to keep, and not to pay, but by direction of a court of equity, since *Rouse* had made over the overplus for the benefit of his wife and children, and showed him a deed Nov. 1709, to that effect; that on the said bill he offered to pay the 1300l. he had still in his hand, and submitted the plaintiff in the cross bill or *Baldwin* should redeem.

[606]

On this case it was insisted, that *Powel* had an absolute estate not redeemable; for the estate conveyed to *Baldwin* was an absolute estate; and though there was a defeasance executed at the same time, yet that made the estate defeasible

sale only in case the 2821l. was paid within a twelvemonth, if not, he was invested with a power to sell absolutely, free from all equity of redemption; that then it became a trust in him to sell; and in case an estate be conveyed to trustees to sell, or devised to them to sell, for payment of debts and legacies, the vendee by virtue of such sale hath an absolute estate, free from all charges or power of redemption.

Perhaps *Rouse* might have redeemed *Baldwin* even after the year, but when he had given him a power and authority to sell, in case the money was not paid within the year, he then became a trustee for that purpose, and his vendee will by his sale, in pursuance of his power and trust, have an absolute irredeemable estate. It may be resembled to the case of *Bonham and Newcomb*, 2 Vent. — where a man conveyed an estate to another and his heirs, under a condition, that if the vendor paid him 1000l. at any time during his life, he should suffer a recovery; but in case of failure of payment, the vendee should hold absolutely to him and his heirs, and his heirs should not redeem. Upon a bill preferred by the heir to redeem after the death of the vendor, it was held the estate was not redeemable; and this decree was afterwards affirmed in parliament.

[607]

Secondly, This case is the stronger because *Baldwin* continued six years in possession as absolute owner before he sold to *Gab. Powel*, and during that time he presented to a vacant benefice, which if he had been only mortgagee, he ought not to have presented to it, because it belongs to the mortgagor to present; then *Rouse* and his wife passed a fine to him, which passed their right in it to him, and made him an absolute estate; and how can he after be able to redeem against his own fine? Besides, his consent was given to the conveyance to *Powel*.

Thirdly, Here have passed twenty years and more since the first mortgage made to *Baldwin*, and it is not usual to admit a redemption after a quiet possession for twenty years together.

And although it be objected, that *Gab. Powel* had notice of the defeasance, and it was excepted in the conveyance and articles, that was but a prudent caution, as was likewise the covenant, that 4400l. was due to *Baldwin* at the time of that conveyance, since *Baldwin* might possibly be accountable for the overplus, if he had sold for more than what was due to him.

But it was answered, and resolved by the court, that the estate was redeemable; for the estate conveyed to *John Baldwin* and his heirs being defeasanced by a deed of the same date, was in its nature a mortgage to him; and therefore though the money was not paid within the year, yet the mortgagor might still redeem, upon payment of principal and interest, at any time while the estate continued in the hands of *Baldwin*.

Then though *Baldwin* had a power, for non-payment of the money within the year, to mortgage or sell in order to raise the money lent, and to be accountable for the overplus, it is not now to be considered what he might have done, but what he has done. And it is manifest, that it was not *Baldwin's* intention to give *Gab. Powel* an absolute and indefeasible estate, for it is not conveyed to him absolutely and free from the equity of redemption; but while the articles of agreement were writing, *Baldwin* shows to *Powel* the defeasance, and insists to have it mentioned in the articles; and when the conveyance was executed in pursuance of these articles, the covenant for enjoyment, and for his having power to convey, is with exception, as therein mentioned, that is, subject to the defeasance.

[608]

And although *Powel* says in his answer, that he treated for the absolute purchase, yet it is evident, that when *Baldwin* insisted to have the defeasance inserted, he has it so, and insisted to have a covenant from *Baldwin*, that 4400l. was due to him, fearing, as he saith, that he should be accountable for the overplus to *Rouse*.

So that this is a very different case from a trustee, who is authorised by will, &c. to sell for payment of debts and legacies; there is no original mortgage, but the trust is directly to sell, and there is no body to redeem, for as the trust was to sell absolutely, the purchaser cannot be subject to redemption, and the heir is at no prejudice, if the purchase money be more than will satisfy the debts and legacies, he will in equity be intitled to the overplus.

Nor can it well be conceived, if *Powel* had expected an absolute estate free from redemption by *Rouse*, he would not have insisted that *Rouse* should have joined in the conveyance; besides he was so conscious of having a redeemable estate, that in 1719 he prefers a bill against *Rouse* and his wife and their daughter, the now plaintiff (who is heir at law to *Robert Rouse*) *Baldwin* and trustees, for incumbrances assigned, in order, it is said, to be quieted in his possession; but

[609]

but he likewise prays that if the court should think his estate redeemable, *Rouse* may be decreed to redeem by a short day or be foreclosed, and likewise confesses he kept 1300l. of the purchase money in his hands to secure against any demands from *Rouse*.

1 Vern. 211,
232. 2 Cha.
rep. 58, 159.
1 Equ. abr.
312.

So that this has no resemblance to the case of *Bonham* and *Newcomb*, 2 Vent. 364. which is likewise reported 1 Vern. 7. for there was no mortgage originally, but a conveyance was made to one who married his niece, on condition that he paid him during his life 100 l. he should reconvey, and his heir should not redeem; which plainly shews his intention was to prefer his niece in marriage with 1000l. or that estate at his own choice, but the feoffee could not compel him to pay the 1000l. in case he desired the money, and all mortgages being only a pledge for security of the money lent, must be mutual in the remedy; as the mortgagor has power to redeem, the mortgagee has power to insist on payment or a foreclosure, but the husband could not insist on payment of the 1000l. or a foreclosure if it was not paid; and upon this foundation it was decreed against the heir; for Lord *Nottingham* considered it as a mortgage decreed a redemption notwithstanding the covenant the heir should not redeem.

It is a known rule, that if a trustee conveys, though upon valuable consideration, to one who has notice of the trust, he is liable in equity to the performance of the trust. If then *Baldwin* on nonpayment within a year stood a trustee, as is insisted, for *Rouse*, his vendee coming in with notice of that trust will stand in the place of *Baldwin* himself, who is acknowledged to be redeemable.

As to *Baldwin*'s being in possession as owner, and presenting to a benefice, that will not strengthen the case, for *Baldwin* had the legal estate, and consequently had a right to present at law; but since a presentation is gratuitous, and the mortgagee cannot account for any benefit from it, a court of equity will compel the mortgagee to present the nominee of the mortgagor, and although by the deposition of Mr. *Williams* it appears that Mr. *Baldwin* presented, it does not appear but he might present at the nomination of *Rouse*.

[610]

And the fine between *Rouse* and his wife and *Baldwin* doth not vary the case, it doth not appear what uses that fine was declared to; and if no declaration of uses, it results to the use of those who had the estate before; it is true if a

tenant

tenant in tail makes a lease not warranted by the statute, and after levies a fine, it corroborates the estate of the lessee; that is, it gives him such estate as the lessor might have made to him by fine, but it does not vary the nature of the lease, which continues subject to the same reservations, provisos, conditions and covenants as before.

And if the fine be levied before any interest vested in the lessee, as where the lease is to commence *in futuro*, and the fine is levied before it commences, it does not operate in confirmation of it.

So here the fine to *Baldwin* may operate to strengthen his estate, and free it from the dower of the wife, which could not be barred out by fine; but it confirms it *in statu quo*, it confirms it as a mortgage, and does not discharge it from the equity of redemption to which it was before liable; for then every fine by a mortgagor, after a mortgage made, would render the mortgage irredeemable.

As to the length of time, it is of little weight in this case, for although Lord *Nottingham* did look upon the statute of limitation as a proper rule to determine the time of redemption; yet that has in many cases been varied from, and no certain rule in point of time has been fixed upon.

But here the conveyance to *Powel* was in 1716, and he preferred a bill in 1719, for a foreclosure; and this bill by the plaintiff for a redemption was exhibited 1729, so that the time of twenty years limited for entry before an ejectment was not elapsed before the bill for redemption against *Powel* was exhibited.

It was therefore decreed, that the deputy should take an account of what was due to *Powel* for principal and interest, and an account of the rents and profits received since the conveyance to *Powel*, and that the administrators of *Baldwin* should account for what rents and profits were received by *Baldwin*, and should take an account of the interest due for the monies advanced by him until he was paid off by *Powel*; and that costs should be reserved until the account taken; that upon payment by *Croft* of what should appear due to *Powel*, he should be permitted to redeem, or otherwise his bill should be dismissed. [611]

And upon hearing the cause that stood next *inter* Sir *John Morgan* ver. *Powel & al*, wherein Sir *John Morgan* as heir and administrator with the will annexed to *J. Ridhouse* his grandfather, to whom *Rob. Rouse* had confessed judgment in M. term 1710, in the sum of 1200l. being the penalty of a bond

a bond given by *Rouse* to him for securing 695*l.* which judgment was prior to the mortgage to *Croft*, which by the verdict was found not to be executed till the 5th of July 1712. though dated in April 1709, it was by consent of all parties concerned for *Croft* and *Powel* decreed, that an account should be taken of what was due on that judgment, as well as of what was due to *Powel*; that Sir *J. Morgan*, on payment of what shall appear due to *Powel*, should be permitted to redeem him, or if he refused, his bill should stand dismissed; and that in case Sir *J. Morgan* should redeem *Powel*, *Croft* on payment of what should be due to Sir *J. Morgan* should be permitted to redeem both; that parties should be examined on interrogatories, and the deputy armed with power to send for persons, papers, records, and to issue commission to examine witnesses, &c.

[612]
Case 263. *Obaldiston v. And. Croft, Harry Croft, Will Kroger and Richard Chaney. In Scacc.*

Court refused to order an account in equity for an attorney's bill taxed by prothonotary of C. B.

BILL suggesting, that the plaintiff being an attorney of C. B. and having a tenant or servant in a public house agreed with defendants *A. and H. Crofts*, brewers, to lay beer and ale to the said house, which he would pay for; that the defendants brought in a bill for 31*l.* 15*s.* that the plaintiff brought in a bill for business done for defendants sometimes as partners, sometimes on their several accounts amounting to 32*l.* 15*s.* 1*d.* that this bill was taxed by prothonotary at 102*l.* 17*s.* that defendants had on trial verdict for 210*l.* 18*s.* this 102*l.* 17*s.* being pleaded by way of set off, and allowance made of it by the jury. But was insisted by the plaintiff, that the prothonotary in his taxation deducted 4*l.* 15*s.* out of the plaintiff's bill as received by plaintiff, which had been otherwise discounted, and the taxation being upon a plea put in to an action brought by the defendants as partners, the prothonotary had disallowed all sums disbursed by the plaintiff for any the defendants on their several accounts; and so prayed that the defendants might come to a fair account with the plaintiff for the monies due to him.

The defendants did not plead, but insisted by way of answer in bar to the account prayed.

And the plaintiff being ready to read his proofs, the defendants counsel objected, that admitting the suggestions of the bill proved, the plaintiff's bill ought to be dismissed, as having no foundation for relief in a court of equity; for if the defendants should be decreed to account here, it would tend to over-hale that taxation of his bill which had already been taken and settled in a proper court; and in case the prothonotary did not make all just allowances, upon application to the court of C. B. the judges would have referred it back to be reconsidered; and in case this method should prevail, which is without example, every cunning and litigious attorney would prefer a bill in equity whenever his whole bill was not allowed, in order to have it re-examined, and the account taken in a court not so proper for it. And though it is said, that the bill with respect to the business done for the defendants in their separate capacities, was rejected by the prothonotary, as not within the rule of reference; yet this is a matter determinable at law, and no impediment to the plaintiff's issue at law, as suggested; and by the same reason every attorney may avoid suing for his fees, and bring a bill against the defendant for an account in another court where his bill cannot be taxed. And though it be said, 41l. 17s. 1d. was charged as received by the plaintiff, which was discounted otherwise, that might have been a ground for a re-examination, if the court of C. B. had been applied to; or if any person had received that sum without consideration, it is money received to the plaintiff's use; but after he insisted on this before the prothonotary, and acquiesced in his taxation, and had the benefit of it upon the trial, it is too late to insist on in this matter; and although this might have been pleaded, yet it may be insisted on by the defendants answer. And of that opinion was the court, and the bill was dismissed.

[613]

Hungate *ver.* Fothergil, Administrator of Eliz. Case 264.
Best. In Scacc.

BILL to have a conveyance of an estate discharged of 6l. *per annum* granted out of it to *El. Best* for her life, on payment of what was arrear at her death. It was referred to the deputy to take an account of what was due, who reported 44l. 16s. 1d. due; but exception was taken to the report,

Board not deducted out of money due unless agreed.

[614]

report, because no deduction was made for what was due for board of *Eliz. Best*, which ought to have been allowed out of the arrears, since her board must amount to that sum or more. But since no agreement appeared that the board should be set against the annuity, the court thought the deputy had done right, for *non constat* but she might pay for her board (and the deputy said she did;) and therefore the exception was disallowed, and on payment of 44l. 16s. 1d. the defendant should convey; but on the failure of payment in six months his bill should be dismissed with costs.

Case 265

Bishop *ver.* Burton & al'. In Ecce'.

Will not read on proof of witness's hand, unless there be positive proof that he is dead.

BILL for account of personal estate, and if that not sufficient, of real estate devised by *Marriot Pett* to *William Jessup* and *William Finch*, for a term of 500 years, for payment of his debts, and sets forth, that *Marriot Pett* by will 16 Oct. 1706, devised *ut supra*, on trust for payment of debts, and after to raise 206l. a-piece to his daughters *Elizabeth* and *Jane*, and died 1722. That the executors refusing, his son *William Pett* took administration with the will annexed; that the defendants *Burton* and *Bance* entered on these houses by virtue of an outlawry against *William Pett* the son, which was now avoided by his death, and judgment for an *amoveas manum*, and therefore prayed an account of profits from *William Pett* generally, from *Burton* and *Bance* since recall of outlawry. But when plaintiff was put to prove the will, the proof was of the hands of *Marriot Pett* the deviser, and of *Gilbert Innis* and *James Sawhill*, two of the subscribing witnesses, who were proved to be dead; and as to *J. Barrington* the third subscribing witness, the witness deposed, that he was credibly informed in the country where he lived, and believes it to be true, that he died two years before, and believes the name subscribed was his proper hand-writing. But the court was of opinion, that was not sufficient proof to have the will read in evidence.

D E

Term. Sanct. Hill.

[615]

12 Geo. 2.

Anonymous.

Case 266

PETITION in Chancery was exhibited against an infant, the heir of a mortgage in fee, upon the statute of Annæ 19. which (reciting the many inconveniencies arising by reason persons under age of 21 years having estates in trust or by way of mortgage cannot convey any free estate in such lands and tenements) enacts, that persons under age, by direction of courts of Chancery or Exchequer, on petition of the *cestui que trust*, or mortgagor, shall convey and assure such lands in such manner as the court shall direct; and such conveyance or assurance shall be as good and effectual to all intents as if such infant was of full age; and such infants shall and may be compelled to make such conveyances and assurances in like manner as trustees or mortgagees of full age are compellable to convey or assign their trust or estate.

Court may order feme covert who is an infant, being heir or trustee, to levy a fine.

The heir, against whom the petition was, was a feme covert, and it was doubted by the Master of the Rolls, whether she could be compelled to levy a fine, because such fine must enure to a double intent, first, to assure or convey the estate as she was an infant, and then to bar her as she was a feme covert; upon which application was made to the Lord Chancellor, who proposed the matter to his consideration, as it might be a case that might come before the Court of Exchequer.

And I thought the Court might order an infant that was a feme covert to levy a fine, for the act is general;

[616]

First, That all persons under age shall convey and assure, so that it seems to be the intent of the act, that every infant, which comprehends all without exception, whether covert or not; and a feme covert cannot assure otherwise than by

by a fine; and the statute directs that such infants shall convey and assure, and the inconvenience before the statute is recited to be, that before an infant could not make a sure estate, so whatever act is necessary for any infant to do in order to make a sure estate, or assure to the party the lands, &c. the infant is compellable to make, for he is to convey or assure in such manner as the Court shall direct, and such conveyance shall be good and effectual to all intents in such manner as if the party was of full age. It seems to be left therefore to the discretion of the Court what conveyance is proper; and whatever it would be needful for a person of full age to do to make a sure estate, the court may direct an infant to execute; and consequently since a feme covert of full age could not assure but by fine, the Court may direct an infant to convey in the same manner; it is true that in many cases a deed shall not enure to a double intent, but that is when one intent was singly in view; for if one and the same act must in the nature of the thing have a double operation or effect, the law will allow it to enure to a double intent; as if a disseisor grant to the disseisee for life or in tail, who resigns it over to another, such assignment enures as a trust and confirmation too. Co. Lit. 302. a.

Case 267 The King *vet.* Richard Manning. In Scacc.

In smuggling goods all present and aiding are principals and equally liable to the whole penalty.

[617]

INFORMATION by Attorney General against defendant, for that merchants unknown having imported 100 weight of tea, value 50l. and landed them in the port of London, the duties not paid or secured, the said tea came to the hands and possession of defendant, knowing the duties not to be paid or secured; whereby he forfeited 150l. the treble value. The defendant pleads *non devenerunt* and on trial before Chief Baron REYNOLDS, a special verdict was found, that the 100 cwt. of tea was imported and landed, the duties not paid; that Thomas Quoy and the defendant, who knew the duties were not paid or secured bought the tea for 20l. on their joint account of one Samuel Gibbon of Ashburnham in Sussex privately, but only a third of the money was paid by the defendant; that they afterwards carried it to Cudham in Kent, and there divided it into twelve parcels, and brought it on horses in sacks to a place near London, and thence carried it into London by night under

under their coats to an inn in *Whitechapel*, where by the defendant's direction, it was put under a bed, on which defendant laid himself down whilst *Thomas Quois* went out to see for a purchaser, to whom they sold it for 24*l.* and the defendant had 8*l.* the third part of that price, for his proportion of the tea.

That the value of the tea was 24*l.* the treble value 72*l.* and whether the whole 100*l.* of tea came to the defendant's possession they submit to the judgment of the Court; and if the Court be of opinion the 100 weight of tea did come to the possession of the defendant, they find so; but if the Court think only a third part of it came to his hands, they find a third only came to his possession. Per stat. 8 Annæ, 7, 17. If any goods whatsoever liable to the payment of duties shall be unshipped with intent to be laid on land, (the customs and other duties not being first paid or secured) or if any prohibited goods shall be imported, not only the goods shall be forfeit, but also the persons assisting or otherwise concerned in the unshipping thereof, or to whose hands the same shall knowingly come after the unshipping, shall forfeit treble the value thereof.

Mr. STRANGE, Solicitor General, insisted that the treble value of the whole 100 weight of tea was forfeit; for defendant and *Quois* having bought the tea on their joint account, the defendant had the possession of the whole, and partners in a wrong are answerable for the whole; and cited a case Mich. 1721, *Doe ver. Butlar*, on a *devenerunt*, where it was said, that the defendant having carried away for his share but four anchors of the 320 gallons of brandy and 200 gallons of wine charged in the information, ought to be charged with no more than what he carried away; but by MONTAGUE, Chief Baron, as the defendant was present when the whole quantity came on shore, he was liable for all, it not being material what he carried off himself; and a verdict was for the King for the whole.

So Michaelmas 1726. *Attorney General versus Amb. Burgess*, on a *devenerunt* for 3000*l.* of tea and 200*lb.* of coffee, it appeared defendant had several partners in the goods, and all did not come to defendant's own hands; but by MONTAGUE Chief Baron, As there appeared no distribution to be made between the partners, and they having a joint property, the possession of the persons to whose hands the goods came was the possession of the defendant; and when several persons are concerned in a fact of this nature,

ture, though they are not all together when the fact is committed, every one may be prosecuted for the penalty separately; that the receiving the goods by the defendant's agents after the landing, was sufficient to charge the defendant, and as all the partners acted their parts, they were agents for one another, and all chargeable; that where several were concerned in taking goods, trover lay against any one; and the King had a verdict for the whole quantity.

So in the cases, *Attorney General* versus *John Palmer*, Pasch. 1727.

Attorney General versus *Edward Carbeld*, Hill. 1732.

Attorney General versus *Sweeting*, Pasch. 1727.

The Court took time to consider those cases, and after some days consideration, I was of opinion for the King, but not merely because the goods were bought on their joint account, for though jointenants *sont seise per my et per tout*, yet to divers purposes each hath but a right to a moiety, as to infeoff, give or demise, to forfeit or lose by default. Co. Lit. 168. a. If two purchase, and one is a villain, the Lord can enter but into a moiety, or if one be an alien, the King, on office found, shall have but a moiety.

[619]

If one jointenant be indebted to the King, but a moiety shall be extended; and if he die before any extent, no extent shall be made on the land in the hands of the survivor. Co. Lit. 185. a.

If A. B. and C. are partners, and judgment and execution is sued against A. only his share of the goods can be sold; it is true the sheriff may seise the whole, because the share of each being undivided cannot be known; and if he seise more than a third part he can sell only a third of what is seised, for B. and C. have equal interest with A. in the goods seised; but the sheriff can only sell the part of him against whom the judgment and execution was sued. So it was resolved by HOLR, and the Court, *Heydon* and *Heydon*, Mich. 5 W. and M. 1 Salk. 392. So it was held *Show. 174. per HOLT*, and no Judge denied it, and *Pollexfen's* opinion accords. And in that case *Backhurst* and *Clinckerd*, *Show. 174.* when a scire facias issued against B. after the seisure of all the partnership goods upon the judgment and execution against A. and the sheriff returned *nulla bona* it was held a false return; for B. had a share of the goods and the possession continued in him, notwithstanding the seisure upon the execution against A.

3 Com.
Dig. 306.
Holt 302,
643.
Comb. 217.

De Term. S. Hill. 12 Geo. 2.

But for the more explicit declarations of the grounds of my opinion, I do agree, First, That where several persons are engaged in a tortious act, all present and aiding and assisting in it are equally culpable, and liable to answer for the whole of the mischief done, and that where they are parties in the act, though not perhaps present at that particular branch of it for which he is charged. It is so in the case of robbery, burglary or other felony; and therefore if A. and B. engage in a robbery, or burglary, and A. stands to watch while B. breaks open and robs the house, or while B. pursues and robs a person out of his sight, and if B. kills the man A. is guilty of the murder; so it is if several come to do a trespass, to make an affray, rob a park, plunder a ship, or run prohibited or uncustomed goods, all engaged in the fact are chargeable with the whole doings and all the consequences of it, if murder be committed by any of the company, though the rest were in other rooms, in other parts of the park, or know not what goods were taken or carried off by others, they are equally guilty; for in the eye of the law they were all present aiding and assisting; and therefore if the defendant had been found guilty of aiding or assisting, or otherwise concerned in the unshipping the tea, I should make no question but he would have been liable to the penalty of the treble value for what he or any others at that time carried off, for they were all aiding, assisting and concurring in the said tortious act.

And this is what was determined in the cases cited; in the case of *Doe and Butlar*, the Chief Baron MONTAGUE saith, the defendant was present when the whole came on shore, therefore not material what he carried off.

So was the determination by Chief Baron PENGELLY, *Bunb. 223.* *Attorney General and Burges*; all the partners acted their parts, and were agents, one for another, and all chargeable. It is said indeed before, the partners having a joint property, the possession of the persons to whose hands the goods come was the possession of the defendant; but this cannot be meant of a joint property by purchase, but where several persons are parties in the tort; in running the goods into other hands, the possession of those to whose hands the goods come is the possession of the defendant, who was party in the running them, though he was not the particular person who brought the goods to the hand in which they were found; for so it is, added he, where several persons were concerned in a fact of this nature, tho'

M m

not

2 Hawk.
P. C. 315;
Foster 349,
350.
Hales P. C.
615, 616,
617.
4 Blackf.
35, 36.
3 Inst. 139.

[620]

not altogether when the fact is committed, yet every one may be prosecuted for the penalty separately; this, or similar to this, must be the case to make all the expressions pertinent and consistent, if we have a full and right account of them.

[621]

Bunb 223r
(in note)

So in the case *Attorney General ver. Palmer*, which was on a *devenerunt* for 1000lb. of coffee. It was objected, that the defendant being hired with others for carrying the goods in the information, he was chargeable for no more than the two bags that he carried.

Chief Baron PENGELLY answered that the defendant was a person to whose hands the goods came within the nature of the statute; for as all the persons went together with one intent, the Crown might charge whom they would. All agents are to be charged, otherwise the act was not made full enough for the benefit of the Crown; and it appeared the defendant had the whole charge of the goods for some part of the time. A private person may bring an action against any one, where several are concerned in taking his goods from him. He remembered an action against two for stranding a ship, when 200 were concerned, and a verdict against them, and they paid the money.

So in the case *Attorney General ver. Edward Carbold*, on a *devenerunt*, for 6000lb. of tea, which it was proved the defendant and others brought from the sea-side at several times. It was objected, The defendant could not be charged with more than the three horse-loads he carried, since the defendant had not the command of the rest, nor was their master.

But it was answered, Where several are concerned in a joint design, they are all answerable, as in cases of cofts and wrongs. In trespass, if several take away goods, all are answerable for the whole. In this case they were all jointly concerned in the same thing, and every one answerable for the whole; cited the last case, *Attorney General and Palmer*, that the several prosecutions there could be but one recovery by the King; for if satisfaction was recovered from one for the whole, the others were discharged; if several bound in a bond, all may be sued, but there can be but one satisfaction.

[622]

Per Chief Baron REYNOLDS, Where several are jointly concerned, it is a joint undertaking, they are all liable for the whole, though the Crown can have but one satisfaction. And the King had a verdict for the whole.

De Term S. Hill. 12 Geo. 2.

And a case was cited, P. 1727. *inter Attorney General and Sweeting*, on a *Deverant* for 18000lb. of tea, 100lb. of cocoa, 150 lb. of coffee.

Objection. The defendant was not chargeable with the words of the statute ; for he kept a public house, and was not responsible for the goods brought there by the guests ; the goods belonged to another, and the defendant could not know but by hearsay that the goods were run. But Ch. Bar. PENGELLY was of opinion, that since the act made, not only the importer, but those to whose hands the goods came after, were liable to prosecution, the crown might charge all to whose hands the goods came after importation ; for the first might not be found, and if other persons could not be prosecuted, the act would be evaded ; and where a person delivers run goods over to another, both are equally guilty.

And afterwards, viz. Feb. 1738. Hill. 12 Geo. 2. the Court gave their opinion. And it was, agreed, first, That in all cases of tort, all persons present, aiding and assisting are equally liable for the whole mischief done ; and one shall not excuse himself by saying he did but little part of the trespass ; for in trespass there are no accessaries, but aiding and assisting it are liable.

So that in pulling down a house, plundering a ship, running goods, which are illicit and tortious acts, all are responsible for the whole damage done. And this is what was determined by Ch. Bar. MONTAGUE, *Doe versus Butland*, the defendant being present, and helping to bring the whole on shore, was responsible for the whole, and it is not material what he himself carried.

So by Ch. Bar. PENGELLY in cases *Attorney General ver. Burgess*, and *Attorney General and Calver*, That where several persons are concerned in a joint fact of this nature, though not all together when the fact is done, every one may be prosecuted for the penalty separately. Bunb. 223. [623]

So Ch. Bar. REYNOLDS determined *Attorney General and Corbold*, where several are jointly concerned, and it is a joint undertaking, they are all liable for the whole.

Secondly, It is agreed, that where run goods come to the hands of any person knowingly, by this statute 1 Ann. each person is made liable to the same penalty of the treble value, although he is but in nature of an accessory in receiving the goods, as well as the principal, who was assisting in the running and unshipping the goods. But there

is this difference between them; he who was present helping the goods on shore is party in the illicit act itself, and therefore is chargeable with the whole; but he who receives any part of the goods after they are put on shore is not party to the original act, but is only culpable for what he receives, and consequently can forfeit only the treble value of the goods that came to his hands.

4 Black. 36.

And I believe no body would think it so consonant to justice, that the receiver of a pound of tea or coffee, that had not paid duties, should pay the treble value of 1000 lb. that was run at the same time, which he knew nothing of. Our law is very cautious in extending punishment beyond its due proportion; and therefore in trespass, Mayhem, *Premunire*, &c. there are no accessaries, for accessaries before by counsel or command are in the same degree as principals; but the accessary after, by receiving the offender, cannot by law be under any penalty, unless the statutes which induce the penalty expressly extend to receivers and comfortors, as some do. Hale's Hist. P. C. 613.

Thirdly, It is agreed, That if a person be hired to carry goods which have not paid duties, knowing the duties unpaid, he is a person to whose hands the goods knowingly came, and consequently liable to the penalty of the treble value, otherwise the act might be easily eluded.

[624]

But there is a difference where a person is hired to help the goods on shore, who being present, and aiding and assisting in the unshipping of the goods, is a party in the wrong, and liable as every principal actor to answer the whole damage. And that was the case of *Attorney General and Palmer*, wherein it was said, that all the persons hired went together with one intent to carry off the goods. If persons are hired to pull down a house, they are all trespassers. But if a porter be hired to carry a parcel of tea after the importation, which he knows was run, he is a person to whose hands that parcel came within the intent of the act, and will be liable to the treble value of that parcel; but I believe no body will say he is answerable for the treble value of the whole cargo.

Fourthly, So likewise if a keeper of a public house receives the whole parcel, which any of his guests, whom he knows to be a smuggler, brings to him, and takes it into his possession and conceals it for him, he is a person to whose hands those goods came, and will be chargeable with the penalty of the treble value of what he so concealed.

De Term. S. Hill. 12 Geo. 2.

but not of the goods carried by other persons to other places. So was the case of *Attorney General* and *Sweeting*, and many subsequent determinations.

Fifthly, So likewise if a person buy any quantity of goods which he knows were run, and the customs not paid, he will be chargeable with the treble value of the goods so bought, for he is a person to whose hands the goods came; for though it was under the pretence of a contract, yet since he knew the customs unpaid, it was an illicit contract, and he becomes *particeps criminis* by receiving those goods; and the contract or purchase will no more exempt him than if he had bought goods of a pirate or felon, which alters not the property of them.

Per stat. 8 Geo. 18. S. 10. Forasmuch as persons using clandestine trade, are greatly encouraged by many for private lucre, who buy and receive goods clandestinely imported; If any shall receive or buy any goods clandestinely run or imported before condemned, knowing the same so to be clandestinely run or imported, forfeits 20l. on conviction before a justice of peace. [625]

But suppose two persons join stock together, and buy goods on their joint account, and one is constant that the goods are run, and the other is not, (which was the present case, for it cannot be intended that *Quoif* knew the goods were uncustomed, unless it had been so found, for *fraus non est presumenda*;) I am clearly of opinion that the defendant is liable to the treble value, though *Quoif* is not; but then the question will be for what quantity he is liable; and I am of opinion that if they had divided the goods after the purchase, that the defendant could be liable only to the treble value of his share, and no more, for no more came to his hand or possession; for though jointenants are seised or possessed *per my & per tout*, that is, they are so far possessed of the whole that none can say, till partition made, that this or that part is not in his possession, yet they in right and reality are possessed of no more than their proper share or purparty.

As therefore they can give or dispose of no more, so neither can they forfeit any more. Co. Lit. 186. a.

If a villain and freeman purchase, the lord is intitled to what his villain is possessed of, yet he can enter into a moiety only.

So if an alien and natural-born subject purchase, though the heir is intitled to all the alien was seised or possessed of, yet

yet the heir, on office found, can have but a moiety. The treble value of what comes to the defendant's hands is the measure of his penalty, but that must be meant of what really and truly comes into his possession, and not what notionally and virtually only can be said to be in his possession.

[626] If partners be of goods, and execution be sued by *feri facias* against one for his separate debt, the sheriff may seize the whole in order to inventory and appraise them, and to have a true account of the value; but he can sell but the share of him against whom the *feri facias* was sued, for the *feri facias* warrants him to a levy *de bonis & catallis* of the one, and all may in some sense be said to be his goods, because he hath a joint interest in all, yet since he hath a right and possession of a moiety only, the sheriff can dispose no more. *Heyden and Heyden*, 1 Salk. 392.

Ante 619.

And notwithstanding such seizure of the whole, the other partner continues in possession of his share or moiety; and therefore where A. B. and C. were partners, and upon a *feri facias* against A. the sheriff had seized the whole, and a *feri facias* came against B. and the sheriff returned *nulla bona*, it was resolved action on the case lay against him for the false return, for B. was still in possession of his third part of the goods. *Bachurst and Clinkerd*, Show. 1713.

Ante 619.
Holt. 643.

However, as this special verdict is found, I think the whole 100 weight of tea came to the defendant's possession, for it is said, that he took care of the whole, that by his direction it was put under the bed, and he lay down on the bed; so that apparently he had at one time the whole under his custody and care, and used endeavours to conceal it, knowing the whole to be uncustomed goods. What more does an inn-keeper or alehouse-keeper, do who takes the goods of a smuggler to lay up and conceal? So it was determined in the case of *The Attorney General and Sweeting*, 1717 and many times since.

A jointenant may make his companion his bailiff, and maintain account against him as such. Co. Lit. 186. a. *He Thomas Quois* intrusts the defendant with the goods to conceal and secure them; suppose he had imbeziled them, would he not have been chargeable by his companion for them? and if so, he must have possession of them.

[627] It is not necessary that he to whose hands goods came should have the absolute possession in them. If a man delivers money to a servant to carry, and he is robbed of

the servant may maintain an action against the hundred, and that he was possessed *ut de bonis suis propriis*. So it was resolved 4 Mod. 404. *Combs ver. Hund. of Bradly*, and yet the possession is not divested out of the master, for he may bring an action if he please.

And judgment was given by the *whole court*, that the defendant should be charged with the treble value of the whole 100 weight of tea, which amounted to 72l.

Philip Earl of Chesterfield *ver* Charles Duke of Case 268
Bolton. In Seacc'.

COVENANT, wherein plaintiff declares, That by indenture 21 July 1713, between *Anne Vaughan*, sole daughter and heir of *John* late earl of *Carbery*, of the first part, *Scroop* earl of *Bridgwater*, *Cha.* earl of *Sunderland*, lord *William Pawlett*, and the plaintiff, then named *Philip Dormer Stanhope*, of the second, *Sir Thomas Stepney*, *Sir Edward Mansell*, *Sir Nicholas Williams* and *Griffith Rice* of the third, the defendant then marquis of *Winchester*, of the fourth, and *Richard* and *John Vaughan* of the fifth part, reciting, that the late earl of *Carbery* devised his estate *in com'* *Carmarthen* for 100 years to *Richard* and *John Vaughan*, on trust to raise 150l. per annum, for maintenance of his two sisters lady *Frances* and lady *Atham* for their lives, reversion to his daughter and her heirs; and that in consideration of a marriage between her and the defendant she conveyed to the said earls *Bridgwater*, *Sunderland*, lord *William Pawlett* and plaintiff and their heirs, all the capital messuages called *Golden Grove*, the demesne lands, park, warren, &c. to the use of the defendant and the said lady *Anne Vaughan* his intended wife, after the marriage, for their lives and the life of the survivor, without impeachment of waste, except such waste after restrained; then to trustees, to preserve contingent estates; then to first and other sons of defendant on body of said lady *Anne* in tail male; then to daughters of said marriage; then to such uses as lady *Anne* by deed or will should appoint, and for want of appointment, to her and her heirs; the defendant covenants with the said earls of *Bridgwater*, *Sunderland*, lord *William Pawlett* and plaintiff, That at all times during his life, the defendant should

Covenant to repair binds tho' house burnt.

[628]

and

and would sufficiently repair and keep in good and sufficient reparation the said capital messuage called *Golden Grove*, and so leave the same at the time of his decease; he being allowed to cut sufficient timber for repairing the same. And the plaintiff assigns the breach, that after the said marriage, viz. 1 May 1730, and from thence continually hitherto, the said capital messuage called *Golden Grove*, and all the buildings thereof, have been in decay and wanted good and sufficient reparation, and great part thereof fallen down; and although the defendant during all the said time was allowed to cut down sufficient timber for repairing the same, yet he hath not repaired the same or any part, or kept it in good and sufficient repair.

The defendant by leave of court pleads double; first, That he hath repaired and kept in good and sufficient repair the said capital messuage according to the form and effect of the said covenant; and thereon issue is joined.

Secondly, That before the said 1 May three fourth parts of the said capital messuage was burnt down, and that he repaired and kept it in sufficient repair until it was so burnt down; and that he hath sufficiently repaired and kept in repair the residue of the said messuage that was not burnt down; upon which the plaintiff demurs.

And it was insisted by Mr. TAYLOR counsel of the defendant, that by this accident the defendant was excused from the repair of the house; for, as in waste the defendant is excused by inevitable accidents, there is the same reason he should be excused in covenant. If a man covenants to deliver a horse, if the horse die before the time, he is excused. *Pal.* 559. And wherever a thing cannot be delivered in the same plight, he will be excused. 1 Co. 98. *Shelly's case*.

Secondly, And this is the more reasonable since the statute 6 *Annæ*, 31. 56 by which it is provided, That no action shall be brought or prosecuted against any person in whose house any fire shall begin, or any recompence made by such person, for any damage suffered or occasioned thereby; in which statute the words are general, and must extend to all persons; and it provides, That the person whose house is accidentally burnt shall not make recompence for any damage suffered or occasioned thereby; and this is the defendant's case, for the plea saith, That the house mentioned in the declaration was burnt by accident without any default of the defendant.

Thirdly

Thirdly, The plaintiff hath not intitled himself to this action of covenant, for the covenant is, That the defendant shall repair, being allowed to cut sufficient timber for repairing the same; so that the allowance of sufficient timber is a condition precedent, which ought to appear to have been complied with before the defendant can be charged with the repair.

It is true the declaration avers, that the defendant was allowed to cut sufficient timber, but does not say there was any timber to cut; and the plaintiff ought to shew every thing requisite to be done on the plaintiff's part, previous to this action; and if there was no timber the defendant could not, nor was he bound to repair; and consequently the plaintiff should have said that there was sufficient timber which the defendant was allowed to cut down.

Fourthly, The declaration doth not shew that the plaintiff, who is the covenantee, had any interest in the land, and consequently that he is prejudiced by the house being burnt; the house belongs to the defendant himself during his life, and it doth not appear he hath any son, or if he hath, he only could be damnified; Why then should the plaintiff recover any damages in this case? [630]

On the other side it was insisted. That in this case the defendant hath expressly covenanted to keep the house in good and sufficient repair, and therefore is obliged to do what he has undertaken to do; he might have excepted fire, as is frequently done; And what reason can there be for such exception, if the party was not otherwise bound to make good any damage that might happen by fire?

This therefore is not like the case of waste, where inevitable accidents excuse, but even in waste, the defendant must repair in convenient time; and if blown down by tempest, consumed by lightning or destroyed by enemies, the tenant may take the materials that remain, to repair; much more where the covenant is express to keep in repair.

So is Dy. 33. a. Where a lease was made of a meadow, in which the lessee covenanted to sustain and repair the banks, so that the meadow should not be surrounded, under the penalty of 10l. but by a sudden and outrageous flood, occasioned by overturning the wears in *Devon*, the land was drowned and the banks demolished. By *Fitzherbert* and *Shirley*, the lessee is excused from the penalty; as where an house is burnt by thunder, or blown down by the wind, because it is the act of God, which cannot be resisted; but yet

38 Hen. 6.
a. 1 Co. 98.
1 Rol. rep.
147. Palm.
549. Hard.
387.

yet he is bound to do it up and repair it in convenient time by reason of his covenant.

So it is said *Stile* 48. the lessee is not chargeable for waste where an enemy invades, unless he be bound by a particular covenant to keep the land let, without waste.

Allen 27. *Paradise* ver. *Jane*, in debt for rent, the defendant pleads expulsion by prince *Rupert* with an army; resolved no plea; for when a man by his own contract creates a duty or charge on himself, he is bound to make it good if he may, though an accident by inevitable necessity happen, because he might have provided against it by his contract. Therefore if lessee covenants to repair an house, though burnt by lightning or thrown down by enemies, he ought to repair it.

[631]

Skin 210.

So *Pool* ver. *Archer*, 2 Show. 40. Covenant to repair, and the house fell down; lessee pleads entry by lessor the next day after the house was burnt down, so that he could not repair; and judgment for the plaintiff.

So in the case *Sti.* 162. *Comton* and *Allin*. So. 2 *Leo.* 189. In 2 *Sand.* 420. *Walton* and *Waterhouse*.

In all these cases it is determined, that the lessee is bound to repair, though the house covenanted to be repaired is consumed by fire.

This case was again argued by Mr. CLARK for the plaintiff, and by Mr. STARKY for the defendant.

And it was insisted for the defendant, first, That the action was not maintainable against the defendant in this case because it does not appear that the house called *Grove Place* was by settlement limited to the defendant in possession, for there is a term of an hundred years limited to *John* and *Richard Vaughan*, on trust to raise 150l. per ann. for his sisters; and another term of — years limited to trustees for the separate maintenance of the duchess after her marriage; and *Grove Place* might be included in one of these terms; and if so, it could never be the intent he should repair it till he came into possession of the estate. *Sed non allocatur*; for if this would excuse the defendant, it was incumbent on him to shew that it was comprised in one of these terms, for it shall not be intended; but in case it was so, when the defendant has expressly covenanted to keep *Grove Place* in repair, he will be obliged to do it, although it had been settled as part of the separate maintenance of his wife. A man may oblige himself by covenant to repair an house in the possession of another.

Secondly,

Secondly, The covenant is, he shall keep in repair, not [632]
that he shall rebuild, and therefore it could not be the in-
tent of the parties to bind the defendant beyond the com-
mon and ordinary repair, and not to make a new house, if
by accident, without the defendant's default, it should be
burnt or demolished. *Sed non allocatur*; for when the de-
fendant covenants he will repair, and keep in good and
sufficient reparation without any exception, this imports
that he should in all events repair it; and in case it be
burnt or fall down, he must rebuild it, otherwise he doth
not keep it in good and sufficient reparation; and this is
warranted by the cases cited, which shew the covenantor
must rebuild if necessity require, as where the house is burnt
by fire, &c.

Thirdly, The estate limited to the defendant is without
impeachment of waste, and consequently the covenant to
repair is contradictory and inconsistent with it. *Sed non alle-*
cat; for the estate is not absolutely without impeachment
of waste, but it is with an exception, except as herein after
restrained; and it is after restrained from cutting trees in
walks or ornamental, and therefore the covenant to repair
is not inconsistent with the estate given him; nor does it fol-
low, that if a person has an estate without impeachment of
waste, that he may not oblige himself by covenant to keep
up an house upon it in repair.

Fourthly, It is not shewn that there was sufficient tim-
ber allowed to the defendant to put the house in repair; the
covenant is, That the defendant shall repair and keep in good
and sufficient repair, he being allowed to cut sufficient tim-
ber for repairing the same, that was not in the walks or or-
namental to the said messuage; now this being in the nature
of a condition precedent, it ought to be expressly averred that
this was done, before the defendant can be charged with
any breach of covenant for not repairing.

It is indeed said, although the defendant was allowed to
cut sufficient timber for repairing, that was not in any walks
or otherwise ornamental, but that is not full enough; for
first, the word (*although*) is no proper or formal averment.
Secondly, It is not shewn there was any timber growing but
what was in the walks or ornamental; and it should have [633]
been expressly alledged there was timber sufficient besides
what grew in the walks or was ornamental to the house; it is
not enough to say he was allowed to cut timber, if there
was none to cut down. It was not sufficient to allege the
defendant

defendant found good security, unless shewn who was the security he gave. Thirdly, It is not said, who it was allowed him to cut down the timber, and so altogether uncertain; this is traversable, and what issue can be joined on this averment?

Sed non allocatur; for it was answered and resolved by the court, that *licet* has been always held a proper word for an averment. Pl. Com.

And as to the other part of the objection, it is enough to make the averment in the words of the covenant; and in case there was not timber sufficient, the defendant might shew it; and as that was a matter for his benefit, it was incumbent on him to shew it, and it shall not be presumed, and it must be intended he was allowed to take it by all who could give that allowance. Judgment upon this plea for the plaintiff.

Case 269

Wallis *ver.* Pain and Underhill.

Tithe for
clover seed
due to vicar.

[634]

BILL was exhibited in the Exchequer by the plaintiff, who was tenant or farmer under the impropiator of the great tithes in the parish of *Prittlewell* in the county of *Essex*, and insisted the defendant sowed a field with clover which was cut for hay; he let the aftermath grow for seed which was cut and thrashed for seed, of which the plaintiff ought to have the tithe as a great tithe. The defendant *Pain* insisted, that he was farmer of a farm called *Milton-Hall*, and that there was a *Modus* to pay 2d. an acre and 10 bushels of wheat to the vicar in lieu of all small tithes; that he had paid to the plaintiff for the tithe hay of his clover and that the aftermath of clover stood for seed and was thrashed for seed, which was a small tithe and payable to the vicar; and Mr. *Underhill* the vicar insisted upon the tithe of clover seed as a vicarial or small tithe.

And by the deposition of several witnesses it appeared, that the difference between clover cut for hay and that cut for seed was considerable, and when made into hay it was cut while the grass was green and fit for cattle to eat; that when cut for seed it stood till the stalk was sear and good for nothing, but was thrown out for stover or fodder, and the seed was the only thing of value or regarded; and that the tithe of clover seed had been always paid to the vicar in

that parish; and looked upon as small tithe; that the impro-
priator had never received it but once about five years ago,
when the plaintiff took it from a woman in the parish; but
for 20 or 30 years the defendant had received it as small
tithes, and 50 years ago it had been paid to or for the vicar;
indeed the vicar Mr. *Underhill* for great part of the time he
has been vicar, held the great tithes likewise.

Mr. *BANBURY* and Mr. *BOOTLE*, argued that clover
seed is in the nature of it great tithe, and due to the plain-
tiff; for as tithe hay is due to him, the seed of that hay
must of consequence belong to him too; that where the
parson is intitled to tithe hay, he will be intitled to the hay
made of clover, as well as of other grafs; and if to the hay,
likewise to the seed.

It was agreed that they could not find that any case had
been in court, wherein it was determined that clover seed
was great tithe, or that it did belong to those who had the
tithe of hay; but two cases were mentioned, one from Ch.
Ba. *Dodd's* notes, and it was the case of *Stanford* and *Hughes*
as cited in the case of *Pocock* and *Cole*, Hill. 1694, in these
words, *Arable land pays tithes to the impropriator in kind,*
sainfoin was sown upon the land and stood to seed, and the pro-
fit was in the seed, and not in the stalk; there was a custom of
2d. per acre for hay, payable to the vicar; and it was re-
solved, That notwithstanding the stalk and seed was in the
nature of corn, yet it should be looked upon as grafs and
payable accordingly. [635]

The other case was from Mr. *Brown's* notes in these
words, *It was decreed that the aftermath of clover grafs is*
titheable, unless a modus can be proved, 3 Jac. 2. *Brook* and
Hall. And *Hall* and *Babb* was cited, *Trin.* 1683.

In this case the Lord Chief Baron cited the case of *Pom-*
fret, parson of *Luton* in *Bedfordshire*, that the tithe of *sain-*
foin should be paid as grafs, and not as grain, though there
was proof of thrashing it and feeding hogs with it, and mak-
ing bread with it, and the vicar then had it.

This case of *Pomfret* ver. *Laundy* and *Waite*, is found
Trin. 2 Car. 2. f. 227, wherein *Laundy* insisted that *sain-*
foin thrashed was looked upon as grain, and sown and often
thrashed as grain, and that the tithe belonged to the im-
propriator, and not the vicar. As to this defendant, the
case was to be farther heard at the setting down of causes
that term, when the court would further consider whether
he should pay tithe of *sainfoin* to the impropriator or the vi-
car, 498. Bunb.

No tithe
due of after-
mowth hay.
F. N. B.
53. Bro.
Disin. pl.
16. 2 Inst.
262. 11.
Rep. 16.
Cro. Jac.
42. Ld.
Raym. 243.
But, contra
1 Rol. abr.
64. pl. 11.
648. Cro.
El. 363,
446, 475,
660. Cro.
Jac. 42,
116. Cro.
Car. 403.
12 Mod.
car, 498. Bunb.

ro. 2 Inst.
652. 2 Eq.
ca. abr. 735.
2 P. Will.
521. In
some cases
it is laid
down, that
tithes shall
be paid of
diverse crops
grown upon
the same
land in the
same year.
Banbury
19, 314.
In others
it is held
wherever
there is in
the same
year a new
[636]
increase of
the same
thing tithe
is due.
Bunb. 9.
Gilb. rep.
in Eq. 231.

car, but no such decree can be found; and as to the other
defendant *Waite* the question was determined on stat. 31
H. 8.

Now by these cases it appears, that it was thought reason-
able the stalk and seed should go together, and consequent-
ly when the impropiator is intitled to the stalk, as he is
when made into hay, he ought likewise to have the seed.

And it would be very inconvenient if it was otherwise,
for the owner might shift his tithe to the parson or vicar as
he pleased; for when it was first cut, it is fit to be made
into hay, the tithe whereof will belong to the parson; but
if he let it stand to dry, that the seed may be ripened and
fit to thrash, then the tithe will belong to the vicar; and
when shall it be said to be dry enough for the vicar? When
it is first cut, the tithe ought to be set out, and the parson
will have it; but after a while the vicar will claim it,
although it was before vested in the parson.

Mr. FLOYER, Mr. WILBRAHAM and Mr. STARKIE,
on the other side insisted, That clover seed is in its nature
small tithe, at least it is a vicarial tithe due to the vicar in
the present case; that there is not one case in point against
it, and tithe of no seed was ever looked on as a great tithe.
It is said that the stalk and seed shall go together, but it is
frequent that the seed or fruit of trees goes to the vicar,
when the tree goes to the parson; wood is always reckoned
a great tithe, and goes to the rector; unless the vicar be
specially endowed with it; but acorns as well as the fruits
of all other trees were always held as small tithes.

But if the matter were doubtful, in this case it appears it
has always been paid to the vicar for thirty, forty or fifty
years, so that there is no pretence in this case to say it does
not belong to the vicar.

But it was a new case, and the court took time for to
consider of it. And

Judgment. Afterwards in the same term, I delivered their opinion
as follows, viz.

As this was a matter that might be considerable in its
consequences in relation to the quiet of poor vicars, I con-
sidered two points.

First, Whether clover seed was in its nature a small
tithe, so that it would belong to the vicar who was endow-
ed *de minutis decimis*.

Secondly, Whether if that was in any respect doubtful

it would not belong to the vicar under the circumstances of the present case.

And I was of opinion that clover seed was in its nature a small tithe. By the constitution of *Robert Winchelsea*, archbishop of *Canterbury*, an uniform payment of tithes was established in the province of *Canterbury*. *Volumus quod decimæ de frugib: (non deduct' expen') integre & sine diminutione solvantur, & de fructibus arborum, de seminibus omnibus, de herbis hortor' nisi parochiani fecerint redemption' pro talibus decimis*; where a manifest distinction is made between tithes *de frugibus* and tithes *de fructibus, seminibus & herbis hortor'*. And *Lind. saith f. 188. decimis*, that tithes *de frugibus* strictly taken mean such only *quæ solent ligari*, but in a larger sense they comprehend not only tithes *de frumentis & leguminibus, veram etiam de vino, silvis cædis, cretæ fodinis & lapicidinis*, that is, all such as commonly are reputed great tithes.

[637]

But speaking of tithes *de seminibus omnibus*, he saith *f. 102. de decimis*, that they comprehend all seeds, *sive in hortis, utpote lini, millii, canabi, grana porrorum, ceparum, hyssopi, caulæ, petrocilini, rapi, lactucæ & aliar' herbarum*.

And upon the words making redemption *pro talibus decimis* he saith, Tithes *de fructibus, seminib' & herbis que reuera decimas int' minutas computantur*; *sunt enim decimæ minutæ que proveniunt de milio, menthâ, anetho, & similibus*; and he takes notice that *Hortiensis* says *quod in Angliâ consistunt minutæ decimæ in lanâ, lacte, caseis & agnis, in partu animalium, pullis, obis, & decimis hortor'*; *decimæ etiam mellis & ceræ numerantur inter minutas*.

So that by common law, as long as the distinction has been made between great and small tithes, which is as long as appropriations to religious houses who usually engrossed the great, but left the small tithes to the curate, all seeds have been reckoned as small tithes.

The common law seems to follow the canon law in this point, 2 Inst. 649. *COKE* speaking of tithes saith, *quædam sunt majores, frument', zizania, fœnum, & quædam minores sive minutæ, que proveniunt ex menthâ, anetho, olerib' & similibus*.

And all the resolutions, relating to tithes which proceed from things newly introduced into *England* have held them to be small tithes; it was so resolved *Pasch. 38 Eliz. Badgerfield and Frank, Cro. El. 467. Mo. 909. 1 Rol. Ab. 235. Owen 74.*

[638]

And

2 Rol. Abr. 335, 643. And in case the Vicar sues the impropriator for the
 Hob. 39. tithes of Saffron in the ecclesiastical court, no prohibition
 Moor 863, shall go. 2 Rol. Abr. 310.

909. So if the field was formerly sown with corn, and afterwards
 Cro. Jac. 28. be sown with saffron, the tithes shall be paid to the vicar
 2 Shaw. 462. for *per Popham*, the tithe of saffron heads are small tithes
 Owen 34. and though the tithes of the field have been paid to the
 Godb. 238. parson, yet when converted to another use whereof no great
 4 Mod. 184. tithes come, the vicar shall have the tithes. Ow. 74.

2 Atk. 365. So Sir *Richard Evedale* versus *Tindal*, Hut. 77. Car. 28. the question was on a special verdict, if woad was
 5 Brown's small tithes or great; and it was unanimously agreed that
 Pal. Cases 586. woad was small tithes; for if no circumstance be to difference the case, hemp, line, saffron, hops, tobacco, and such new things shall be *Minutæ decimæ*.

1 Sid. 447. So where prohibition was prayed to a suit by a vicar for tithe of woad, suggesting it to be a great tithe, the court doubted because it is reckoned, as the book says, in *minutæ decimas*, as hops, &c.

1 Sid. 443. So on motion for a prohibition to a suit for tithe of hops it was said hops, woad, and such small things of new invention, are *minutæ decimæ*.

Pal. 219. So *Ward* and *Britton*, the question was whether the land was small or great tithe; *BRIDGMAN* Ch. J. said *minutæ decimæ* comprehend only tithe of gardens, hemp, hops, saffron, &c.

1 Vent. 61. So it is said hops are of the nature of small tithes.

[639] So flax was small tithes, resolved *per* three justices *Wharton* and *Lisse*, 3 Lev. 365. 4 Mod. 184. Carth. 26 Skin. 341, 356. So it was held in *Noah Webb's* case, Car. 1 Rol. 643. sec. 3.

It is true some opinions have been, that small tithes may be estimated not from the nature of the thing titheable, but from the quantity of the tithe, and therefore it was said *Evedale* and *Tindal's* case, if all the profits of a parish consist in such things, hemp, hops, wool, lambs, &c. may be great tithes. So in Cod. Ju. Eccl. 691. it is said hops and gardens are small, in fields great tithes; and in the case *Wharton* and *Lisse*, *HOLT* Ch. J. at first seemed of opinion that tithes must take the denomination of small or great from the quantity of the crop growing, but the three other justices held strongly that the tithes were great or small from the nature of the things which yielded the tithes; and *HOLT* yielded to it so far, that he absented himself from judgment.

judgment was given; which he would scarce have done, if he had been fixed in the contrary opinion.

And this seems the better opinion, for it gives foundation for continual debate, what shall be a quantity too large for small tithes; if it be said what grows in a garden, some gardens are not half an acre, others two or three acres; gardens are enlarged now-a-days to fifty or a hundred acres.

Perhaps that may be a proper distinction as to pease, beans or other pulse, because they had existence in former times, and appropriations were made *de Bladis & Leguminibus* to religious houses; but as to things newly introduced into England, there is but little reason that the patentees, who claim only what came to the crown upon the dissolutions of monasteries, should have tithe of those things which were never appropriated, and to which the religious houses dissolved never had title.

As to clover seed there does not appear any express determination in this court; that it is in its own nature a small tithe; it is a seed, and all seeds are mentioned as small tithe, and no instance appears that ever any seed was held to be a great tithe; it is a seed newly introduced, and therefore there is reason to look upon it to be of the nature of those things of a new invention, which by the cases cited have always been held as minute tithes.

[640]

It is true that clover grass made into hay is of the nature of all other grass made into hay, and consequently must belong to the parson, or other person who is intitled to tithe hay; but it does not follow, when it stands for seed, and is not made into hay, that the seed may not be small tithes.— Wood is a great tithe, but acorns, mast, &c. are small tithes; rape seed, caraway seed, turnip seed, mustard seed are small tithes; but if the herb be growing with other grass and made into hay, it would be great tithe; vetches are great tithe if mowed or cut when ripe, but if cut green for cattle they are small tithes.

Doer, and
Stud. 175.
11 Co. 81. a
1 Rol. 100,
101, 640.
Cro. El. 55.
Hughes Abr.
691.
Moor 908.
11 Co. 48.
Stat. 45.
Ed. 3,
Plov. 470.
557, b.
Cro. El. 1.
Moor 907.
Cro. El.
478.
Moor 761.
Reg. 49.
2 Just. 643.
403.
Cro. Jac.
100.

So apples and other fruits are confessedly small tithes, but the wood of apple trees and other fruit trees, if cut in a year when no tithe paid of the fruit, is as other wood for firing, great tithe; but in the year when tithes is paid of the fruit, if then felled no tithe shall be paid of the wood, the fruit being looked on as the principal.

And this may answer an objection, that it would be in the power of the occupier to make it great or small tithe,

and so favour the parson or vicar as he pleased, by cutting it for hay or letting it stand for seed; it may as well be said a man may fell his apple trees the year he tithed the fruit or after, to prejudice or favour the parson.

The cases mentioned from Mr. *Dod's* and Mr. *Brown's* notes are imperfect hints of those cases; I obtained a note of them from Ch. Ba. *WARD's* notes, which are thus:

[641] Pasch. 1680. *Woodford* and *Standfast*, Question was,— Whether clover should pay tithe as hay, and should be within a modus of 2d. per acre for all meadow and mowing ground when the clover stands for seed, and a great quantity is produced.

Note; The court was divided; *MONTAGUE* Ch. Br. and *ATKINS*, that it should be accounted hay; *RAYMOND*, before his removal and *GREGORY* to the contrary, and after *WESTON* inclined it was not within the custom; but the plaintiff the day after the term prayed to dismiss bill without costs or prejudice, which was admitted.

Pomfret and *Lauder Wait & al's* 8 July 1680, tithes of clover grass trashed and made into horse bread, and hogs fed with the seed, yet adjudged to be hay, and tithable to the vicar who was endowed with hay, and not to the impropiator, as a new and different tithe from hay.

In these cases it appears the dispute was between the impropiator and the vicar who was endowed with the tithe of hay, for the seed of *sainfoin* or clover, (for in that the reports differ) the impropiator insisted it was of the nature of corn or grain, and consequently belonged to him.

In the first case the court was divided; in the second, inclined, that the seed belonged to the vicar; so that as far as the authority of these cases goes, the tithe of the seed was decreed to the vicar; it was true the vicar was endowed of the tithe of hay, and the expression of some of the judges was, That the seed should go with the stalk, and should be looked upon as hay or grass; but such expressions might well be used in favour of the vicar, who was intitled to tithe hay, in opposition to the impropiator's claim, who would have it taken to be of the nature of corn, because horse bread was made of it, and hogs fed with it. And therefore it would be too rigid a construction of those expressions to say they imported, That the seed should in all cases be reputed of the nature of grass or hay, since they are apparently different; although in these particular instances where the vicar had tithe hay, they may be resembled

De Term. S. Hill. 12 Geo. 2.

bled to it, since one as well as the other belonged to him. The whole authority of these cases result to this; that *fainfoin* or clover seed is not of the nature of corn or grain; in which the court being divided in the first case, the plaintiff finding the inclination of the court, desired to dismiss his bill without costs; which was admitted. In the second case it appears not what determination was finally made, nor does it appear what became of it in the entry of the deputy remembrancer; whether it was properly great or small tithes was not at all under the consideration of the court; and by the cases before cited it seems most reasonable to account it of the nature of small tithe.

[642]

But in the present case it seems most evident it should be so taken, since by the depositions in the cause it appears, that for 40 or 50 years in this parish the vicars have received the tithe of this seed; and although the impropriator hath frequently hired the vicarial tithes, yet it was rarely, if ever, taken by him when he did not hold both.

And all the Barons agreed in opinion, that the plaintiff's bill should be dismissed with costs.

BARON PARKER seemed to doubt of the first point, because of the expression in the cases cited, that the seed and stalk should go together.

See Stat. 11 & 12 of Will. 3. ca. 16. & 31. Geo. 2. ca. 12. as to the tithe of flax, hemp and madder.

[643]

Termino Paschæ.

12 Geo. 2.

Case 270 The Aldermen and Burgesſes of Bury St. Edmund
and Lawrence Wright, Plaintiffs, *ver.* Lewis
Evans Defendant. In Scacc'.

BILL for ſmall tiſhes was brought by the plaintiffs ſetting
forth, That king *James* the firſt was ſeiſed in fee of the
rectories and vicarages impropriate of the pariſhes of St.
Mary and St. *James* in St. *Edmund's Bury* in the county of
Suffolk, and of all tiſhes great and ſmall belonging to the
ſaid rectories and vicarages, formerly part of the poſſeſſi-
ons of the monaſtery of *Bury St. Edmund in com' Suffolk*.

Preſcripton
“ in non
decimando”
againſt a
Lay impro-
priator held
not good.

That being ſo ſeiſed, by letters patent dated 1 July 6 Jac
the King granted to the Aldermen and Burgeſſes of *Bury St.
Edmund*, and their ſucceſſors, (*inter al'*) *decimas tritici
garbar', lanæ, vitular', &c. & omnes & omnimodas decimas
dict' monaſterio ſpectan' tam majores quam minores*.

[644]

And afterwards by letters patent dated 17 Sept. 12 Jac
the King granted to the ſaid Aldermen and Burgeſſes, and
their heirs and ſucceſſors, (*inter al'*) the rectories of St.
Mary and St. *James*, and the vicarages of the ſame churches,
the advowſons, rights of patronage, &c. *Ac omnes &
omnimod' decimas tam majores quam minores, prædial', mixtas
& minutas*, to the ſaid churches, &c. *dicto monaſterio ſpectan'*.

That by indenture 2 April 1724, the Aldermen and Bur-
geſſes of *Bury* made a leaſe to the other plaintiff *Wright*
all their tiſhes of corn and grain, ariſing within the ſaid
town of *Bury* in the ſaid pariſhes of St. *Mary* and St. *James*
for the term of eleven years.

De Term. Pasch. 12 Geo. 2.

And afterwards, taking notice that by the said lease the tithes of corn and grain only were demised, and the small tithes in the said parishes by mistake were omitted; altho' they were intended to have been leased, and the plaintiff *Wright* the lessee ought in conscience to enjoy them; it was by an order of council, entered in the council-books of the corporation, agreed, that a bill should be exhibited in the name of the corporation or *Wright*, or both, for the recovery of the said small tithes due from the defendant and others for lands by them held in the said parishes, and on such recovery, satisfaction should be made for the same to the plaintiff *Wright*; that the defendant *Lewis Evans*, from the year 1724, to the year 1734, held several lands within the said parishes in the town of *Bury*, particularly 184 acres part of a farm called *Eldo* farm, or the old farm, which farm for the greatest part lay in the parish of *Ruffham*, and only one hundred and eighty four acres part of it lay in the parish of *St. Mary*, which farm was parcel of the possessions belonging to the monastery of *Bury St. Edmund* in the county of *Suffolk*; that the defendant *Evans* likewise held in the said parish of *St. Mary* during the said years several lands called *Wood Went*, containing about ninety-four acres, and other lands containing about thirty-six acres, and other lands about nine acres, on which were arising yearly great quantities of corn, hay, clover seed, turnips, and other small tithes; whereby the said aldermen and burgeses, or the said *Wright*, became intitled to demand the said tithes; and pray, that the defendant may shew cause why the defendant should not make satisfaction for the same to the said *Wright*; the said Aldermen and Burgeses consenting he should receive the same; and that the plaintiffs may have such relief in the premisses as the nature of their case in equity and good conscience doth require.

To this bill the defendant answers, and admits, that he hath held the several lands in the bill during the time charged, particularly the said one hundred and eighty-four acres, parcel of *Eldo Farm*, or *Old Farm*, which was part of the possessions belonging to the monastery of *Bury St. Edmund*, and the lands called *Wood Went*, and the said thirty-six acres and nine acres in the parish of *St. Mary*, and believes the several kinds of tithes and quantities mentioned in the bill might be arising in the said several years, but insists, that he hath paid and satisfied to the plaintiff *Wright* for all the tithes of corn and grain growing in the said years; but that

that no small tithes were ever paid or demanded for the said lands; and doth insist, that as no small tithes, or any satisfaction or composition for the same, were ever paid by or demanded from the defendant, or any persons under whom he claims, in respect of the said lands, or from any other owners or occupiers of lands in the said town of *Bury*, after such length of time and so long enjoyment of lands freed and discharged from small tithes, a legal discharge is to be presumed; and it must be necessarily intended the small tithes by due course of law were aliened or released to the owners of the said lands by the persons intitled to the inheritance of the said small tithes, though the conveyance or release, or other legal discharge be lost or destroyed, especially since the small tithes in the said parish of *St. Mary* are of equal value with the great tithes arising there.

[646] This cause coming on to be heard on Thursday 17 May 1739, the plaintiffs produced the said letters patent 6 & 12 Jac. the lease and order of council, and by depositions of *Charles Woodward* and *Francis Wright* (all which were read) proved that forty or fifty years since they held lands for many years in *Bury*, or collected the tithes there, and small tithes were paid by several persons in the said parish of *St. Mary* and *St. James*; and they had heard their fathers (who held land forty years there before their having lands there) and one *Richard Copsy* deceased, declare small tithes in the said parish ought to be paid or compounded for.

On the part of the defendant it was proved by deposition of several witnesses, that forty-eight or fifty years before they gathered corn in the said parish, and never knew any small tithes paid or demanded.

Mr. *BOOTLE* and Mr. *STARKEY* of counsel with defendant, insisted, first that the bill was not proper which demands satisfaction for small tithes to the plaintiff *Wright* who had no lease of, or title to them. *Scd non allocatur*; for the plaintiffs shew the title of the corporation to great and small tithes, the lease of the great tithes to the plaintiff *Wright*, and their intention he should have the small tithes; and then conclude, that the corporation, or he, are intitled to such small tithes; and then pray that the defendant may shew cause why he should not make satisfaction to him for the small tithes arising on his lands, the corporation consenting he should have them; and they pray general relief as the nature of the case requires so that the court may consistently with the prayer of the bill direct the defendant to account

De Term. Pasch. 12 Geo. 2.

to the plaintiff *Wright* for his great tithes not satisfied, and to account to the corporation for the small tithes which are not comprehended in their lease to him, and to which therefore the corporation continues intitled, notwithstanding it is prayed that the defendant should shew cause why he should not make satisfaction for them to *Wright*, they consenting he should have that satisfaction.

Then it was insisted by the counsel for the defendant, that since there was no proof of any small tithes being ever paid by the defendant, (although it was proved by *Richard Micklefield* that two shillings had been demanded per acre for the small tithes of the lands he held, part of *Eldo* or *Old Farm*, and he offered eighteen-pence per acre, but afterwards he refused to pay it;) and that it was proved by several witnesses they never knew small tithes paid for, and that the small tithes were more in value than the great tithes in that parish; it was insisted, [647]

That in the case of a lay impropriator, the defendant might say in bar of the demand of tithes, that no tithes had ever been paid or demanded for these lands.

It is true in the case of a rector or spiritual person, no one can prescribe against him in a *non decimando*; but otherwise it is in the case of a lay impropriator.

And the reason given in the bishop of *Winchester's* case, *Fitz. 79. 2 Co. 44.* (that if such a prescription should hold in the case of a spiritual person, a jury of lay gentlemen would not be equal in the trial of such prescription) fails in the case of lay impropriators.

And although there was no express determination in the point by this court, yet many judges were of that opinion; in the case of *Benson* and *Oliver* in this court, where the bill was by a lay impropriator, the chief baron and another baron were of that opinion; indeed when it was spoken to in 1727 and 1730, the court was divided in opinion, and so no decree was made.

In the case of *Meadly* and *Tomlins*, Pasch. 7 W. 3, the bill was by a lessee of the dean and Canons of *Windsor*, and in the case of *Talbot* ver. *Samon, Harding & al'* 1736, the plaintiff was a lessee of the bishop of *Litchfield* and *Coventry*, the court determined not the matter by allowing the prescription alledged, because they were in effect ecclesiastical persons, being lessees for years to such as were spiritual persons.

And

And in this case, though there was proof of payment of small tithes by the inhabitants of St. Mary's, yet none were paid by defendant; one witness indeed said he promised to pay for the tithes of clover seed, but he might apprehend that to be great tithe before the determination of the court in the case of *Wallis and Pain*; and though he once offered to pay eighteen-pence in the pound when two shillings was insisted on, upon better thought afterwards he refused to pay it.

[648]

And the court being earnestly desired to consider the case, and it being a matter which might frequently come before the court, they took time to think of it till next term; and in Trinity term the Ch. Baron delivered the opinion of the court to the effect following.

The matter for the determination of the court may be considered under two heads;

First, Whether a layman can prescribe in a *non decimando* against a lay impropriator.

Secondly, Whether the defendant hath made out a case which may intitle him to the benefit of such a prescription.

And in both these points the opinion of the court was for the plaintiff.

As to the first question, they think there is no foundation for such a distinction, that the defendant may prescribe against a lay impropriator any more than against an ecclesiastical person; which it is admitted he cannot. For,

Fitz. 79.

First, No such distinction appears in any law book whatsoever; the rule is laid down generally, that a layman cannot prescribe in a *non decimando*, but in *modo decimando* he may; this is said by *Choke* so long ago as 8 Edw. 4. 14. this is expressly resolved in the bishop of *Winchester's* case, 2 Co. 44. 1 Rol. Abr. 653.

The same is agreed in several other cases, *Wright* ver. *Gerrard*, Hob. 306. Mo 425. 2 Keb. 28, 60.

And in *Slade and Drake*, Hob 297. it is largely decanted upon, and agreed by Lord Ch. J. HOBART to be a settled principle of law.

[649]

So *Seld. de decimis*, ch. 13. f. 2 3 vol. f. 1279, who was not thought averse to the privileges of laymen in the enjoyment of tithes, after an account given of the infeodations of tithes to laymen, which by the laws of *France* and *Spain* were still allowed, concludes that infeodations were in *England* as in other states, but of later times none are allowable, derived from other original than the statute of dissolutions;

De Term. Pasch. 12 Geo. 2.

olutions; that discharge by prescription of paying no tithes, or any thing in lieu of them, by the later canon law, since the parochial right established, is allowed only to spiritual persons, but to no layman, the laity being incapable of tithes by pernaney, as also of discharge by bare prescription, saving in cases within the statute 31 H. 8.

And the reason given in the books why a layman cannot prescribe in a *non decimando*, is, because a layman, since the parochial right established, is incapable of tithes in pernaney; so saith lord Coke, 2 Co. 44. as well as Mr. Selden *supra*; and consequently, as he cannot take a grant of tithes to himself unless upon a consideration paid for them, as upon a real composition by parson, patron and ordinary, or by a *modus* given in lieu and satisfaction; so he cannot be discharged from the payment of them; for a real composition shall not be intended unless it be shewn.

Reason why a layman cannot prescribe in a "non decimando." Davis 6, b. 13 Co. 16. 1 Jon. 369. 1 Rol. Ab. 653. 1 Vent. 274.

It has indeed been objected, that there is no foundation for a layman to be excluded from the benefit of such a prescription, since there is no incapacity in him to take such a grant; and therefore it is hard that time, which establishes a right in other cases, should weaken his right in respect to his discharge from the payment of tithes, and consequently he shall have no advantage from a real composition, unless he can produce it, which yet in length of time, may as well as other grants be lost; and yet in other cases where there has been an immemorial usage to pay or to be exempt, some grant shall be presumed originally made, to warrant it.

But this will not appear altogether so hard, if it be considered, that when the parochial right became established, and tithes were the fixed and settled revenue of spiritual persons only, a grant of them to any other person was void, unless made upon a valuable consideration, so that there was *quid pro quo*; as was the case of a real composition or *modus decimandi*; it was void not from any incapacity in the grantee to take, but from the impropriety of the thing granted, which being appropriated to spiritual persons as their proper and peculiar maintenance, could not be given to a layman; that this was so, appears by an epistle of pope Innocent the third, in the body of the canon law, lib. 3. tit. 30. ca. 29. *de dec.* where it is said, *preceptio decimarum ad ecclesias parochiales de jure communi pertinet*; and Lind. speaking of portions of tithes which a parson might prescribe to have in the parish of another, saith *portiones paraverunt pervenisse ad locum religiosum de concessione laici*, &c.

[550]

de

de decimis vel proventibus quos laicus talis habuit ab ecclesia in feudum ab antiquo hoc verum est, si tales portiones decimarum eis donatae fuerunt ante concilium lateran' celebrat' anno 1130, Temp. Alex. 3 Nam ante illud concilium potuerunt laici decimas in feudum retinere, non tamen post tempus dicti concilii.

And the canon of that council runs, *Prohibemus ne laici decimas cum animarum periculo detinentes in alios laicos possint transferre, si quis vero receperit & ecclesiae non reddiderit Christiana sepultura privetur.* Cod. 691.

Hence it is manifest, that it was not thought a layman was incapacitated to be the pernor of tithes, from any incapacity in his person, but from the nature of the thing granted; which being esteemed in those days as the peculiar revenue of the church, and laymen being under so severe penalties prohibited to hold them, it is no wonder the common law, which in many instances admitted the authority of the canon law in those times, should hold the permanency of them by a layman as unlawful.

But since a layman may claim an exemption from payment of tithes by real composition as well as by a modus, why should not he prescribe to the exemption as well in one case as the other? There is a plain difference; for when he prescribes *in modo decimandi*, the compensation to the parson manifestly appears in the prescription, and if no advantage to the parson appears, the *modus* is not good; but if a man should be allowed to prescribe in a *non decimandi* without shewing any consideration at all, it would be liable to great abuse; and it is not so great a hardship for a temporal person to keep the instrument of his real composition when he knows it necessary he should do so, as it would be mischievous to the clergy, if that was not requisite; for composition by a parson and a successor for some years might soon give pretence to set up a prescriptive right.

Secondly, Another reason, why a layman should not prescribe against a lay impropiator, any more than against an ecclesiastical person, is, because a lay impropiator, may claim under a spiritual or ecclesiastical person; for even a patentee of the crown, who can lay claim to tithes, may claim it by virtue of the statute 31 H. 8. 13. or other statute for the dissolution of religious houses.

The statute 31 H. 8. is the first act of parliament then enacted the king and all persons who should have any manors, lands, &c. belonging to the religious houses, then by dissolved, should hold and enjoy the same freed and discharged

charged from the payment of tithes in as full and ample manner, as the abbots, &c. had the same at the time of the dissolution.

Now it is well known that none of these religious persons could be exempted from the payment of tithes but by his order, the pope's bull, composition real, prescription or unity of possession; and every patentee of the crown, that is, every lay impropiator, must allege a title to the tithes he demands, by grant from the crown of some rectory, vicarage or other tithes, which were part of the possessions of some religious houses which came to the crown by that or other statutes; and therefore, as lord *Hobart* says in *Slade* and *Drake's* case f. 296. a temporal person succeeding a spiritual person in discharge, (and it is the same in the perception of tithes) it is to be reckoned in a spiritual person, and not in a temporal; and consequently a man, who could not prescribe against an ecclesiastical person, cannot any more prescribe against the patentee who derives his title from and under him, and is in the nature of his representative.

[652]

As to authorities in the case, it is agreed there has not been any determination against the plaintiffs; the case of *Benson* and *Oliver* was rather in favour of the plaintiff; for though the court was divided upon the circumstances of that case about making a decree, or leaving him to law, the plaintiff brought his action on the statute 2 & 3 Ed. 6. 13. which was tried before the chief justice *RAYMOND*, and recovered; and the other two cases mentioned, *Meadly* and *Tomlins*, Pasch. 7 W. 3. and *Talbot* and *Salmon* 1736, seem authorities for the plaintiff, for there the lessee of the dean and canons of *Windsor*, and lessee of the bishop of *Coventry* and *Litchfield* (though laymen) had decrees for their tithes, although a constant nonpayment was insisted on; and what difference can there be in the reason of the thing between a lay lessee and a lay impropiator, if the prescription is allowable only, because he is a layman, and not an ecclesiastical person?

There are two cases, of which my brother *Parker* hath given himself the trouble to get copies, they may be fit to be considered on this question.

The first is the case of *Medly* and *Talmy*, Pasch. 7 W. 3. wherein the plaintiff, as lessee of the rectory of *Leominster* in com' *Suffex*, exhibited his bill against the defendant for tithes of corn and grain growing on his lands in the said parish, and suggesting, the defendant pretending his lands were

[653] were exempted from the payment of tithes, refused to discover how they were so discharged. The defendant by answer insists, That his father in the year 1652, purchased the lands in defendant's occupation of one *William Cooper* of *Maidstone* in *Kent*, which in the purchase deeds were mentioned to be free from the payment of tithes, and conveyed as such, but the antient deeds are lost or mislaid, so that he cannot set forth by what ways or means they are exempt. The cause coming to be heard before Chief Baron *WARD*, and *J. LITT. POWIS* then Baron, on reading the purchase deed 1652, and great debate, the Court thought not fit to decree for the plaintiff without a trial, and proposed an action should be brought on statute 2 Ed. 6. which the plaintiff declining, the bill was dismissed by consent without costs.

It is probable the defendant had a legal exemption which the plaintiff was conscious of, but thought to take advantage of the loss of the defendant's deeds, whereby he was disabled to make it out; but the Court not favouring his design, chose to dismiss his bill without costs.

The second case brother *PARKER* hath copied out, was *The Mayor, Aldermen and Burgeses of Warwick* against *Lucas*, Trin. 9 Anne, and heard 5 July 1710. the plaintiffs sued as impropiators of the rectory of *St. Mary* in *Warwick* for the tithes of two closes called the *Upper Fryers*; the defendant admitted the plaintiffs intitled to all rectorial tithes in the parish except those two closes, which he insisted were the site of the mansion-house of the late dissolved friars preachers in the town of *Warwick*, which came to the crown by the dissolution of the said house, and were freed from the payment of tithes by virtue of some prescription, bull, order or other lawful means, and had ever since been held free from payment of tithes to the rector or vicar; and that the monastery being a spiritual corporation were capable of being discharged by prescription. And upon debate the bill was dismissed by the Court, with the plaintiffs consent, with moderate costs.

In these two cases it does not indeed appear directly whether the defendants could make out a legal discharge or not; it was probable they could, and the plaintiffs thought it so probable that they cared not to try that point, but consented the bills should be dismissed; but they are far from shewing the opinion of the Court, that a bare prescription could be set up against a lay impropiator any more than

an ecclesiastical person; for if so, the bills ought to have been dismissed with costs without more ado. But as where an ecclesiastical person sues, if the defendant has a probable ground of discharge, it is not proper to decree against it, without putting it in a way of examination, which the court seemed willing to do in these cases; but the respective plaintiffs doubtful of the issue, chose rather the bills should be dismissed.

[654]

But for the clearer illustration of this point, it may not be improper to consider in what cases a defendant may be discharged by prescription, and in what not.

Where any man occupies lands which came to the crown by the dissolution of religious houses by virtue of the statute 31 H. 8. 13. or statute 32 H. 8. 24. it is manifest he may insist on a discharge by prescription; for since the religious houses dissolved by those statutes (being ecclesiastical bodies) were capable of a discharge by bull, order or prescription, the patentees of any part of the possessions belonging to any of those houses, are enabled by a special clause in the acts to enjoy the same acquitted and discharged of the payment of tithes, in as full and ample manner as the ecclesiastical persons enjoyed them at the time of dissolution, &c.

And by the statute 2 Ed. 6. 13. no person shall be compelled to pay tithes for any lands, &c. which by the laws and statutes of the realm, or by any privilege or prescription are not chargeable with the payment of them.

Secondly, A spiritual person, or the King who is *persona sacra*, being capable of tithes in perannuity, is capable of prescribing to be discharged of the payment of tithes.

That a spiritual or ecclesiastical person may so prescribe is resolved in bishop of *Winchester's* case, 2 Co. 44. Cro. El. 511. So it is in *Richard Bishop of Lincoln's* case. Cro. El. 216. 1 Rol. 264. Mo. 435, 618. Yelv. 2. Cro. El. 785. Jon. 358.

That the King may likewise prescribe in a *non decimando*, appears 22 Aff. 25. 10 H. 7. 18. Mo. 483. Sti. 137. Jon. 387. Het. 67. and in many other books.

But I know not that it has been allowed in any other cases.

It was insisted on in the case of *Sidowne and Holmes*, Cro. Car. 412. 1 Jon. 368. 1 Roll. Ab. 654.

Plaintiff in prohibition surmised that the prior of *Bristol* was seised in fee of lands in his possession, and he and his predecessors time out of mind, till the dissolution of the priory

An ecclesiastical may prescribe.

1 Rol. abt.

653.

Cro. Eliz.

475, 559.

785.

2 Co. 43, 45.

Ante 649.

1 Leon. 242.

Moor 425,

619.

[655]

Yelv. 2.

2 Bl. Com.

31.

1 Stran. 482,

485.

3 Burr.

1273.

5 Bac. abt.

64, 86, 92,

98

Wood's Inst.

173.

5 Comy.

Dg. 116.

The king

may pre-

scribe.

priory by statute 27 H. 8. held them discharged of the payment of tithes, and by patent the lands came to *Edward Battel*, and to the plaintiff as his lessee; and it was insisted that the prior being capable of tithes and of being discharged by prescription, the plaintiff ought to have the benefit of the discharge; but by three judges it was resolved, That the prior being capable of a discharge by privilege as well as by grant or composition, it shall not be intended to be a discharge by composition, but rather by privilege, which was the general course of exemption, which privilege was gone by the dissolution, and consequently the plaintiff ought to pay tithes; and a consultation was awarded.

And *ROLLS* said it had been so resolved 7 Car. in the *Exchequer*, and in another case 11 Car. by the same three judges.

Cro. Jac.
607.

The like resolution was in the case of *Wright ver. Gerard*, Hob. 306. 1 Jon. 2. where the plaintiff insisted upon a discharge by unity of possession of a farm called *Downhall* and of the rectory impropriate of the same parish, both which came to the crown by statute 27 H. 8. and the plaintiff claimed the farm, as the impropiator did the rectory, by grant from the crown; but a consultation was granted.

[656] The like resolution was in the case of *Bowles and Atkins*
2 Keb. 162, 1 Lev. 185. 1 Sid. 320. 2 Keb. 28, 60, 472. where
375. debt was brought on the statute 2 Ed. 6. 13. against the lessee of *All-Souls College*, who insisted, that the prior of *Abingdon* and his predecessors held the lands time out of mind, discharged of tithes till their alienation to the college of *All-Souls*; but it was unanimously agreed by the whole Court, that the college being a temporal corporation could not prescribe in a *non decimando*. And it was said in that case, that this point had been resolved in the case of *Sidowne and Holmes* held for good law in all the courts of *Westminster*.

These are so many determinations in the matter in question, and much stronger than the present case; and it appears, that no difference was made between a lay impropiator and a spiritual person; for the ground and reason why such prescription is not good, is not in respect of the person against whom the prescription is alledged, but in respect of the person prescribing; because a layman is not capable so to prescribe, though an ecclesiastical person may.

And this is confirmed by all those cases where a *modus* is insisted on for the discharge of the tithe of hay, corn, &c. because it is spent for the fodder of their cattle, the maintenance of their family, &c. which was always disallowed, because it amounts to a prescription in a *non decimando*. 160. 683. And such *modus* was disallowed for the same reason, as well where Sir *H. Waller* a lay impropiator li- belled for the tithes, as where the parson of the parish sued for them; and after argument at bar a consultation was granted, because none can prescribe in a *non decimando*. 2 Bro. 47. And many cases might be cited to the same purpose.

So where the King prescribes to be discharged of the payment of tithes (as he may) his patentee being a lay person cannot do so; as was resolved 11 Car. where in a prohibition the plaintiff declared, that King Ed. 6. was seized in fee of the forest of *Savanach in Com. Wilts*, and twenty acres of wood, parcel of the same forest, and held the same time out of mind discharged of the payment of tithes, and granted them to the duke of *Somerset*, and by these conveyances the twenty acres of wood came to the plaintiff, whom the defendant sued for tithes. The defendant pleaded, the twenty acres were not parcel of the forest, and by verdict found they were. But it was resolved, the alienee of the King could not have advantage of this prescription in a *non decimando*; for a real composition or other consideration for such discharge shall not be intended, without shewing it specially, and then the grantee of the town cannot be discharged. 1 Rol. Ab. 655. Jon. 387. 117. And in case the grantee of the King cannot prescribe in a *non decimando*, although he claims under the town, which was exempt by prescription from the payment of tithes, it may be justly inferred, that he cannot do so in any other case; and that the law will not allow any person to prescribe in that manner, unless it be a person ecclesiastical or sacred, as the king is, who was enabled to hold tithes in perannuity, or unless he be within the exception created by the statute 31 H. 8. or 32 H. 8.

By the words of the answer it looks as if some stress is laid upon the parish being exempt in this case; for the answer says, that no small tithes, or any satisfaction or composition for the same, were ever paid by or demanded from the defendant, or any under whom he claims, or from any other owners or occupiers of lands within the town of

Bury

[657]

A custom
of exemp-
tion of
tithes can
only be al-
leged in a
county, or
in *pais*.

Farres. 113.

137

1 Sauod.

141, 142.

Comb. 403.

Holt 671.

Ca. B. R.

111.

[658]

1 Ld. Ray.

137.

12 Mod.

111.

Raym. Ent.

170.

4 Mod. 336,

to 341.

Lutw. 1316.

Bury St. Edmund; but the counsel for the defendant did insist upon this, nor indeed could they with any colour so; for besides, that it appears by the depositions in cause, that small tithes had been paid by several inhabitants there, it was resolved in the case of *Hicks and Wood* T. 6 W. & M. 4 Mo. 336. Carth. 392. Salk. 560. t. Skin. 560. that a custom to be exempt from the payment of tithes could not be alledged in an hundred, much less in a parish; but it must be in a county or in *pais*, such as the wild of *Kent*; and there only for things not due of common right, as for wood, &c. And therefore custom alledged in the hundred of *Huntsfil* to be free from tithes for the agreement of barren cattle, was after a verdict for the plaintiff which found the custom, held to be a void custom, and confirmation was awarded, which was a farther authority in confirmation of the general maxim of law, that a layman cannot prescribe in a *non decimando*.

Thirdly, Another reason may be given for the disallowing the defence set up for the defendant in the present case in that the defendant does not alledge any particular ground of discharge, but only saith, That no small tithes were ever paid or demanded for his lands; and therefore at such length of time, and so long enjoyment of lands free from payment of tithes, a legal discharge must be presumed, and it must necessarily be intended the small tithes were aliened or released to the owners of the land by the person intitled to the inheritance, though the conveyance or lease or other legal discharge be lost or destroyed.

I agree, that in courts of equity the same formalities are not required as in pleadings at law, but the substance of the matter alledged for the exemption of the defendant ought to be shewn with so much certainty at least, as the Court may see what is insisted on, and direct the same to be proved or examined. In case a prescription is relied upon, the defendant ought to alledge the prescription in such a manner as that it may be tried. In this case the defendant did not so much as say, he is excused by prescription, he alledged indeed no small tithes were ever paid or demanded, which may be evidence of a prescription; but in all cases where a prescriptive right is insisted on, that is the matter which must be tried; and can the Court direct a trial of what is not alledged, or where that only is alledged, that may be some proof of it, or whence it may be inferred? Moreover, less, whether any legal discharge generally, or whether

De Term. Pasch. 12 Geo. 2.

any conveyance, release or other legal discharge; an issue must be upon a single point, not a matter complicated, confused or multifarious. Co. Lit. 303.

In the case of *Priddle and Napper*, 11 Co. 9. where the defendant in prohibition traversed the prescription alledged, instead of the unity of possession, which was the ground (if any) the plaintiff had to excuse himself from the payment of tithes, it was held to be ill; for he ought to have traversed the unity, *ratione*, &c. as he was discharged, and consequently his plea was insufficient.

In *Slade and Dick's* case, Hob. 204. it is said that the discharge of tithes being against common right, he must plead it with its ground and reason specially; it is true a spiritual person being capable of a discharge by prescription, might alledge the prescription generally, without assigning any reason for such discharge; but here is no prescription directly insisted on, which could be sent to a trial.

Many cases might be cited to shew the impropriety of such pleadings, but it is less needful, since the matter, if it had been more properly insisted on, had been insufficient.

The second question, whether by any thing else appearing in the case, the defendant may excuse himself from the payment of tithes; for it was urged, that there being an unity of possession in the abbot who had the rectory *Eldo Farm* in fee, and consequently the defendant ought not to be charged for the small tithes of 184 acres, part of that farm; but how does this unity of possession appear? All the proof offered for it is, that the plaintiff makes title to the rectory and vicarage of St. Mary, and of all tithes medietal, mixt, and minute, *monasterio de Bury St. Edmund super spectan'*; and that by a roll out of the augmentation office, it is said that 4 Nov. 31 H. 8. the abbot and convent of Bury surrendered to the King the monastery and church of Bury, and all manors, messuages, lands, tithes, vicarages, &c. belonging to the said monastery. That 10 July 37 H. 8. the duke of Norfolk accounted to the crown for the manor of Old Haw, Hee and Rusham, part of the possessions of the monastery of Bury St. Edmund, assigned to the King, and by him granted to the duke of Norfolk, at 21l. 17s. 4d. *per ann.*

Now it does not appear that *Eldo Farm* was part of the manor of Old Haw, nor is it so much as averred by the answer; there is nothing to induce a probability of it, but an imagination that *Eldo* may be a corruption of *Old Haw*,

O o

which

2 Roll. abr.
320. P. 4.
[659]
2 B. ownl.
25
H. ru. 70.
Hob. 298.
2 Co. 48. a.
1 Leon. 333.
C. El.
29, 584.
585
Moor 530.
534
Dochin
Placit 531.
O. Slade &
Drake.
1 Jo. 6.
1 Roll. rep.
250
N. y. 97.
W. Ent.
648.

[660]

which is a thing merely imaginary and destitute of all proof; but admitting it really was, not only that ought to have been expressly alledged in the answer, but it ought likewise to have been shewn that the abbot and convent had been seised of the rectory and lands *simul et semel* time out of mind, and continued so seised till the time of the dissolution; for according to *Priddle and Napper's case*, 11 Co. 14. b. every unity that amounts to a discharge from payment of tithes, by virtue of the statute 31 H. 8. ought to have four qualities. It ought to be rightful, and not commence by wrong. 2. It ought to be equal, that is, the abbot and convent ought to be seised of the rectory and land both in fee. 3. It ought to be perpetual, having continuance time out of mind. 4. It ought to be constantly free from payment; for if the tenants for years or will under the abbot and convent ever used to pay tithes, the unity will not avail.

And Lord HOBART adds a fifth quality; it must have constant continuance in the same body, else it is of no force. *Wright and Gerrard*, Hob. 306, 310, 311.

And the same qualifications have been agreed and confirmed by many subsequent resolutions and authorities.

Now if the defendant had by his answer insisted, that there had been such an unity of possession in the abbot and convent of the rectory or vicarage of *St. Mary* and of *Eldo Farm*, the plaintiff might have been able to prove that *Eldo Farm* and *Old Haw* were not the same estate; that *Eldo Farm* was never in the abbey and convent; nor does the defendant insist or make out, that he derives his title to that farm under the duke of *Norfolk*; that the rectory was appropriate within time of memory; that the lessees paid tithes, or that the estate was in lease at the time of the dissolution: in which cases these lands would not be discharged by the statute. Vide Cro. Eliz. 584. Mo. 528. 2 B. 65, 66. Jon. 412.

And for these reasons, the Court decreed the defendant to account for the several matters prayed by the bill.

Case 271 Jones & ux' *versus* Meredith & al' In Scacc.

IN ——— term ——— Geo. 2. Complainants exhibited their bill, setting forth that *Giles Meredith* died seised certain lands above 100l. *per ann. in Com. Monmouth*, leaving issue only one son *Giles Meredith*, and three daughters *Catherina*

Cro. Jac.

607.

1 Jon. 2.

Cro. Jac.

453.

Hob. 311.

Digg. Par-

fons coun-

fel, 334.

Gdoolp.

454.

2 Co. 47.

1 Leon.

332.

Sav. 62.

[661]

Moor 420.

533.

Protestant
kin, when
aided in a
court of c-
quity.

Catherine, Cicely, and Mary since married to *William Watkins*, who are the defendants; and the plaintiff having married *Mary* the only sister, and who on failure of issue of the said *Giles Meredith* the father, is his heir at law; that *Giles* the son entered and died seised Oct. 1736; that his sisters *Catherine, Cicely* and *Mary* were educated in the Popish religion, whereby the plaintiff *Mary*, their aunt, being the next protestant kin, is entitled to enjoy the rents and profits of the suit by virtue of the statute, until the defendants take the oaths and conform.

That the plaintiff hereon brought an ejectment in C. B. in Hill. term last; but *Roberts* another defendant caused himself to be added a defendant in the said estate, and insisted on a mortgage of the said estate, made to him by the other defendants for a term of years for security of 400l.

Therefore the bill prays a discovery whether *Giles Meredith*, the father and son, did not die seised, and when; that *Roberts* may discover whether *Catherine, Cicely* and *Mary* were not educated in the popish religion, and now profess it; and whether not of the age of 18 years and six months at the death of *Giles* the son, or of what age; and whether they have not refused or declined the said oaths, and are thereby incapacitated to hold the said estate; whether plaintiff *Mary* is not next protestant kin, and what incumbrance he has; and that plaintiff's may redeem, &c. But at the beginning of the prayer it asks, that all the confederates may answer the premisses (which comprehends all repeated in the praying part) as fully as if repeated and interrogated.

Catherine and *Cicely* the two unmarried defendants, as to such part of the bill as prays to be let into the possession of two-thirds of the estate, or that plaintiffs may redeem, or seek other relief, demur. As to such part as prays these defendants should discover whether the said defendants were educated in the popish religion, or now profess the same, or at death of *Giles Meredith* the son, were 18 years of age and six months, or of what age, or whether they have refused or declined the oaths in statute 11 & 12 W. 3. and thereby incurred the incapacities of that act, and whether plaintiff *Mary* is not their next of kin, they plead the statute 11 & 12 W. 3. and as to the rest of the bill they answer.

The defendants *Watkins* and his wife put in the like defence and plea.

De Term. Pasch. 12 Geo. 2.

It was insisted on by Mr. *Wilbraham* and Mr. *Murrey* for the defendants, that the demurrer and pleas of all the defendants were good and ought to be allowed.

[663] First, As to the demurrer by *Catherine* and *Cicely Meredith*, the unmarried sisters of *Giles Meredith* the son, it was urged, that this was a case wherein equity would not interpose; that by the statute 11 & 12 W. 3. 4. in case a person educated in the popish religion do not take the oaths and subscribe the declaration mentioned in the act, he is disabled to inherit or take any lands; and the next Protestant of kin may hold and enjoy them, without account for the profits, till he does take the oaths and subscribe such declaration; so that a severe penalty is put upon the party, the forfeiture of all his lands; and it is not unusual for a court of equity to aid a penal law, or enforce it, or carry it further than the law will carry it; if the plaintiffs have right to the land, but if they have no title at law, this Court will not give them one; it is more properly the business of a court of equity to relieve against a penalty than to assist the recovery of it.

Secondly, The bill prays that the plaintiffs may redeem the mortgage, but they are not entitled to redemption, none can redeem but the mortgagor himself, his heir or assignee, or some incumbrancer that has a lien upon the estate. A man makes a bond to B. for money lent, and dies and his heir assigns the equity of redemption, B. cannot redeem till he has obtained judgment upon the bond against the heir. Eq. Abr. 315.

Thirdly, None can redeem but he that has a right to the estate in the land; but the plaintiff has not the estate in the land, that still remains in the defendants; all that the plaintiff can pretend to, is a perception of the profits during the incapacity, which is a meer chattel interest, which gives no right to the land itself; and indeed the defendants have the right of redemption in them. In the case *Lomax and Bird*, 1 Vern. 182. where the heir general the mortgagor preferred a bill to redeem, the defendant in his answer set forth a deed of intail, whereby the estate was intailed to another; the plaintiff offered to redeem at peril, but the Court would not permit it, unless he would shew the intail was docked.

Fourthly, It would introduce great inconveniences if the plaintiff should be allowed to redeem, for the estate would become irredeemable; for the plaintiff standing in the place

De Term. Pasch. 12 Geo. 2.

of the mortgagor, if he be capable to redeem, and having the mortgage assigned to him, the same person would be both mortgagor and mortgagee, and he could not redeem himself.

Besides, the protestant kin would be answerable for waste, but as mortgagee he could not be sued for waste; and who shall pay the interest? Shall the plaintiffs have the rents and profits, and let the interest run in arrear?

As to the plea it was insisted, that the defendants were not obliged to discover what might subject them to a penalty; for when a bill prays a discovery of what might be dangerous to the party discovering, he may take either method, to demur or to plead to that part of the bill; in this case the defendants have pleaded the statute 11 & 12 W. 3. 4. to shew nothing is denied to be answered by the defendants, but what would endanger their incurring the penalties inflicted by that act.

[664]

In case a bill be for discovery, if defendant has set forth his great tithes pursuant to the statute 2 & 3 Ed. 6. 13. which subjects him to the forfeiture of the treble value, in case he hath not done so, the defendant is not obliged to answer, unless the plaintiff waives the penalty, and agrees to accept the single value only.

And there in the case of *The Attorney General ver. Mico*, where a bill was to discover, whether the defendant did not conceal the customs and excise upon 260 casks of currans imported, and had endeavoured to corrupt the custom-house officers by promising 40l. reward to conceal it, on demurrer by the defendant the Court inclined to think he should not be compelled to make a discovery, unless the Attorney General waived the proceeding for all forfeitures. Hard. 201.

¹ Danv. 171.
¹ Eq. abr.
75.
D. c. 3.
Hard. 137.

On a bill to discover what waste he had done, demurrer to it was allowed. 11 Car. *Attorney General ver. Vincent*.

² Eq. cas. : b.
378, c. 9.
Bunn. 192.
¹ Eq. cas.
ab 40. c. 4.
77. c. 10.

So on a bill to discover marriage, where a devise was to the defendant *durante viduitate*, which by her marriage would be lost, the defendant demurred, and the demurrer was allowed. *Monins and Monins*, 2 Cha. R. 68.

In many cases, acts of parliament have by particular clauses provided, That the defendants might be put to make discovery of matters in which they are concerned, upon their oaths, which seems to admit they would not otherwise be liable to make such discovery; for if they had, there had been no need of such provision; as by statute

[665]

De Term. Pasch. 12 Geo. 2.

tute 12 Anne 14. §. 5. it is enacted, that on a *quare impedit* brought by the university for benefice of any popish recusant, the court may examine patron or clerk concerning the right of presentment in open court, or by commission or affidavit, in order to discover any secret trust, fraud or practice relating to such presentation.

1 Atk. 526.
2 Eq. cas.
abt. 378.
c. 12. 626.
c. 27.

So by stat. 1 Geo. 55. 1. which obliges papists to register their estates, it is enacted, That persons suing for penalty may by bill in Chancery demand a discovery, to which no plea or demurrer shall be allowed.

And Trin. 1737 at sittings in Chancery after term, Int. *Smith* and *Read*, it was determined by Lord HARDWICK Chancellor, That the defendant was not obliged to discover by answer whether he be a papist, or not; in that case, on marriage of Mrs. *Pain*, with Mr. *Smith*, a settlement was made to the use of husband and wife for their lives, and after to the first and other sons of that marriage in tail; remainder to Mrs. *Pain* in fee, who devised it to the defendant; and the bill was to discover if the deviser was not a papist, in which case the devise would be void; and on plea to this bill, Lord Chancellor held, that defendant was not obliged to answer; which is an authority in point; for that was rather stronger, it being insisted the defendant was not required to answer with respect to himself, but only in respect to the person under whom he claimed; but it was insisted it was a penal law, and the answer would subject the party to the penalty.

As to the case, with respect to *Jones* against *Watkins* and his wife, there is more ground for the allowance of the demurrer as well as the plea, the plea stands upon the same foot with the former; but as to the demurrer, besides what was alledged for the support of the former demurrer, it was insisted, that here was no colour for the bill against *Watkins* and his wife, since here was no title made for the plaintiff to demand the possession, or the rents and profits of that share or property of this estate that belonged to the wife of *William Watkins*, who is not alledged to be educated in, or to profess the popish religion, and consequently must be intended to be a protestant.

[666]

And if the said *William Watkins* be a protestant then the question will be, Whether if a papist seised of an estate in fee of lands and tenements marry a protestant, the next of kin to the wife can take the possession of the estate out of the hands of the protestant husband; for by the statute 11

and

De Term. Pasch. 12 Geo. 2.

and 12 W. 3. the papist is disabled in respect of himself only; but when a papist marries, the husband becomes seised in right of his wife, and consequently the estate is vested wholly in him, and he has done nothing to forfeit it; besides, the husband may be said to be next of kin to his wife, there is an alliance and affinity betwixt them; and the next of kin, within the meaning of this law, is not the next of blood or the next in course of descent, and therefore the father may take before the uncle, and the brother of the half blood before the sister of the whole, Co. Lit.

Besides, the intention of the act to prevent the growth of popery, is as well answered by the papist marrying a protestant, as by selling the estate to a protestant, for such marriage may be a means of bringing over the family to the protestant religion.

In answer, it was urged by Mr. BUNBURY and Mr. BOOTLE, that if the demurrer in this case was allowed, the act of parliament would be eluded, for every papist would mortgage his estate, and the protestant kin would be defeated without remedy.

The demurrer is to the whole relief prayed, and surely the next of kin may redeem; he is a kind of purchaser under the act, and stands in the place of the heir; and tho' it is said to be a penalty, but to be relieved against a fraud in setting up this mortgage. Mod. Ca. in Law and Equity 146. *Winter and Birmingham*, bill by next protestant kin to account for the rents and profits was allowed. [667] 2 Eq. cas. ab. 624. c. 19.

As to the plea, that is ill; for the bill does not pray they should discover, whether papists or not, but that the other defendant *Roberts* should do so; besides it goes to the discovery which surely they may be asked.

As to the demurrer by *Watkins* and his wife, her disability is not removed by her marriage, nor is the husband sole seised; the pleading is, the husband and wife are seised in right of the wife; besides the demurrer confesses all alleged by the bill, and goes to the whole relief, which is not proper to be determined on a demurrer.

This matter arising upon a new law, the Court took time to consider it, and in Mich. Term. Sat. —Nov. Baron THOMPSON being dead, the other three barons agreed in opinion, That the demurrer by the defendant *Merrell* ought to be overruled; and at the desire of the others, I delivered the opinion of the Court to this effect.

That

That the demurrer is bad, as to such part of the bill as seeks to be left into possession of two thirds of the estate in the bill, to be permitted to have and enjoy, and be quieted in the possession thereof by the injunction of the Court, or seek to redeem the mortgage mentioned, or any other relief. Now it is plain, and agreed by the counsel for defendants that the demurrer being intire, if it be faulty in any part, it ought to be over ruled.

It is so at law ; if the defendant demur to the whole declaration, or the plaintiff to an avowry in replication for rent, of which part appears not yet due, the plaintiff or avowant shall have judgment to recover for such part as is well demanded, or appears to be due. 1 Sand. 286. Resolved 2 Sand. 379, 380.

[668] It is the same in equity, and the reason is obvious ; for the demurrer is a stop to the plaintiff's demand of every thing to which it extends ; but it would be unreasonable to refuse the aid he is in conscience intitled to, because he asks something more.

Perhaps it is improper for the plaintiff to pray the Court should let him into the possession of the estate, for that he must recover at law ; but there are other things wherein the plaintiffs may be proper to ask the assistance of the Court. The bill suggests that the plaintiffs have brought an ejectment ; but the defendants, by making a mortgage to Roberts and making him a defendant, render it impossible for them to recover at law ; and pray it may be set aside, or if made *bonâ fide*, that on payment of what is due they may be admitted to redeem.

In respect to which the Court may probably give relief, but the demurrer is against all relief.

But it is objected, that in case the plaintiffs as the next protestant kin may have the rents and profits by virtue of the statute 11 & 12 W. 3. yet they have only the bare perception of the profits, and no estate in them, for the legal estate remains in the popish heir, who may sell, devise or transmit it to his posterity, and consequently the protestant kin can have no title to redeem.

It is true, the words of the statute being, That every such person educated in the popish religion or professing it, shall in respect of himself only, and not in respect of his heirs or posterity be disabled to take, &c. the seisin of the estate has been construed to remain still in him ; for otherwise it would be difficult to say how his heir could have the estate

De Term. Pasch. 12 Geo. 2.

estate consistently with the known rules of law. So it was held in *Tredway's* case Hob. 73. Ley 59. upon the statute 1 Jac. 1. which is penned in the same manner; and therefore papist tenant in tail may make a tenant to the præcipe, and suffer a common recovery; as was resolved *Thornby and Fleetwood*, 12 Anne, and in Lord *Derwentwater's* case 6 Geo. 1. So he may devise the estate to a protestant. Resolved in C.B. 1738. *Mallom and Bringloe; Marribod and Dorrell*, H. 8 Geo. 2. in B.R. 2 Eq. Cas. ab. 621. c. 7, 8, 9. *Matlem v. Bingloe & ux.* Com. 570. 2 Eq. Cas. ab. 626. c. 26.

Jenk. 297
10 Mod.
113, 356.
406.
2 Bro. P.
C. 203.
Com. 207.
1 Stra. 318.
[669]

But yet the next protestant kin after entry has an estate and interest, which enables him not only to receive the rents and profits, but likewise to lease the lands during his title, otherwise he could not maintain an ejectment; and if he has such an interest that he may lease, surely he may likewise redeem a former mortgage, as well as lessee for years may do so. A copyholder is not seised of the estate, the seisin of the freehold remains in the lord of the manor; yet as a copyholder may make a lease whereon an ejectment is maintainable, 4 Co. 26, so he may redeem a mortgage made of the copyhold estate.

Tenant by statute-staple, statute-merchant or *elegit*, has but a chattel interest *quousque debit' levat' fuerit*, yet daily experience shews he is admitted to redeem.

It is said indeed, a protestant kin is a mere Pernor of the profits, and therefore cannot redeem; but why? No authority is cited for it. In *Chudleigh's* case, 1 Co. 123. it is said, that a Pernor of the profits is in nature of a *cestui que use* at common law; but none I believe will deny, but that *cestui que use* might exhibit a bill in equity to have the trust executed, and to redeem a mortgage made by the trustees with his assent. Bro. Conscience.

Dyer 295,
pl. 11.
Poph. 70.
Jenk. 278.
1 And. 309.

It was urged further, that none can redeem but he who is heir, assignee or Incumbrancer; and this is the general description of those who are intitled to an equity of redemption.

But it is sure, there is no necessity a man should come in for a valuable consideration in order to intitle him to redemption; for a person who claims by a voluntary settlement may redeem. Eq. Abr. 315. And so it was resolved Ca. Ch. 59.

If a man make a voluntary conveyance, and after mortgage, though such mortgage may avoid the conveyance as fraudulent

[670]

fraudulent to him, yet it suffices to pass the equity of redemption.

In. red generally, he that redeems must be the mortgagor, or somebody that claims under him; but it is not requisite he claims by express assignment from him. Tenant in dower or by the curtesy may redeem, whose estate is created by the law; and he, who has an estate or interest given by act of parliament, has as much reason to have this benefit as he that comes in by the act of the party. Every one is party to an act of parliament; and there seems to be no reason why the person intitled by virtue of an act of parliament, should not have equal advantage in a court of equity with the assignee of the party. The assignee of commissioners of bankrupts may redeem as well as the bankrupt himself. *Dub. Ca. Ch. 71. Adm. 3 Vern.*

The only ground for redemption seems to be the having an interest in or lien upon the land; he that has such interest or lien may redeem, he that has none cannot.

And therefore if a man makes a bond, wherein he binds himself and his heirs, and after mortgages his land, the obligee by judgment cannot redeem. But if he obtains judgment against the heir of the obligor, although the heir had before assigned his equity of redemption, the obligee who gains thereby a lien upon the estate of the obligor against his consent, (for *judicium redditur in invitum*, and solely by the operation and act of law, is intitled to redeem. *Bateman and Bateman, Eq. Abr. 315.*

Nay, if he gains but an equitable lien upon the land, it is sufficient; and therefore if a man articles on his marriage to make a marriage settlement, and after mortgage his estate to one who had no notice of the articles, the wife shall redeem; for the articles for a purchase are considered in equity as a purchase. *2 Vent. 343.*

So if a man agrees at his marriage to leave his wife worth 1000l. and it being left to the parson of the parish to draw the agreement, who takes a bond for the payment of the money, and then the obligor dies, leaving his estate freehold and copyhold in mortgage; the wife, having an equity upon the land by virtue of the agreement on marriage, was allowed to redeem. *Aston and Pierce. 2 Vern. 480.*

But against the plaintiffs having the liberty of redemption it was further argued, that a court of Equity ought not to aid or assist the execution of a penal law; and it

certain

certain, that it is not in the power of a court of equity to extend a penal law beyond what the law itself imports, or the Courts of law will extend it; nor is it proper for a court for to assist the recovery of a penalty or a forfeiture, when he may proceed at law to recover it; therefore there is no reason to apprehend, that the Court will in this case put the plaintiffs into possession, if the law will not do it, or give them any advantage beyond what the law intended them. But if the defendants by contrivance set up a mortgage, which renders their proceeding at law impracticable, it may be fit for a court of equity so far to interpose, as to prevent the unfair measures which are designed to elude the benefit of the law.

If a lessee commit waste, the Court will not oblige him to discover the wrong he has done, which may subject him to a penalty, or construe that to be waste which the law will not call so; but will stay his going on in the destruction he is making, till it be seen whether he has any right to do so or not. It is said Eq. Abr. 131. 2 Vol. 590. that if a trustee, by fraud and combination with *cestui que trust*, endeavour to evade a penal law, under pretence that equity should not assist a penalty or forfeiture, Chancery will aid, and not suffer its own maxims to be made use of to elude a beneficial law.

It was said, that if the mortgage was without any real consideration, it would be a trust for the papist, and consequently void at law; but I doubt that it is not so; for by what has been said it appears, that a papist has such an estate in him that he may alien and demise, and consequently the estate granted to *Roberts* would pass an interest to him, though made without a valuable consideration, which would be a title prior to the demise by the lessor of the plaintiff in ejectment.

[672]

As to the inconveniencies that may ensue from the plaintiffs being allowed to redeem, I see no greater than what may be supposed in a redemption by a dowress, or other person who has but a particular estate or interest. It may be said, he is mortgagor and mortgagee, if he take the assignment of the mortgage to himself; and as for his being punishable for waste, he is liable to answer treble damages for any voluntary waste in an action of debt.

In short the plaintiffs may have many occasions for the aid of a Court of equity; and therefore since the demurrer is general to all relief, since such a practice of setting up a mortgage

mortgage to prevent the protestant kin from recovering if he can have no relief, would intirely defeat the design of the act, we are of opinion the demurrer ought to be over-ruled.

As to the plea, we all agree that it ought to be allowed for the discovery, to which this plea is pleaded, tends directly to make the defendants accuse themselves of those offences which might subject them to the penalties and incapacities of the act. It is the excellent temper of the *English* law, that nobody is compelled to accuse himself *nemo tenetur seipsum accusare*.

This has been determined not only in courts of law and equity, but in parliament.

[673] It is true, that by a constitution of Cardinal Otho, the pope's legate 21 H. 3. it was ordered, *quod juramentum calumniæ in causis ecclesiasticis & civilibus de veritate dicenda in spiritualibus quo veritas facilius aperiatur, præstari debet cætero in regno Anglæ Consue in contrarium non obstante*. But this was allowed only in causes matrimonial and testamentary. 2 Inst. 657. And by statute 13 Car. 2. 12. No ecclesiastical judge can tender oath whereby any person may be charged to accuse himself, or subject himself to confusion or punishment, &c.

1 Atk. 526. But the case of *Read* and *Smith* is a direct determination in point; or this is rather a stronger case, where the defendants are asked as to their own education in the popish religion; there they were interrogated only as to the person under whom the defendants claimed.

2 Eq. ab. 378, c. 10, 626, c. 27.

What was said, that *Roberts* is asked whether they were not brought up in the popish religion, is a mere evasion for though *Roberts* the other defendant is asked these questions, yet all the defendants are charged with being so educated, and all desired to answer the matter as fully as if the same were particularly repeated and interrogated.

It was said the defendants might be asked what age they were of; but the charge is, that they were of the age of 18 years and six months, whereby they were incapacitated to hold the estate; so that the inquiry about their age, only with design to subject them to that incapacity; and the plea is worded with like caution.

As to the demurrer and plea of *Watkins* and his wife, they stand upon somewhat a different foot; it is not charged by the bill, that *Watkins* the husband was a papist, and consequently it must be intended, that he is a protestant

For every one must be presumed to be of the established religion till the contrary appears; then the question will be, Whether, if a papist marry an husband who is a protestant, the next of kin, that is a protestant, to her before her marriage shall take the rents and profits of her estate from the husband during coverture?

[674]

The statute saith, That the person educated in the popish religion shall be disabled to take and hold any lands, &c. but the husband is not so educated, and consequently not disabled to take and hold them, as by the law he is intitled to do.

It was rightly observed, that the pleading is, That the husband and wife are seised in right of the wife; whence it was inferred, that both being seised, the protestant kin will be intitled to have and enjoy the lands the wife is still seised of after her marriage.

But that inference is not to be drawn from the form of pleading; for it is true, that the wife has a joint seisin with the husband of the freehold and inheritance, which the husband therefore cannot dispose of without her; but the husband alone has the title to the rents and profits, and may dispose of the possession during the coverture without the wife. A writ of enquiry *sur disseisin* was brought against husband and wife, who pleaded *non-tenure*; the demandant replied, that A. was seised till disseised by husband and wife, who made a feoffment to persons unknown, but the husband and wife continued to receive the profits; but the replication was disallowed, for the pernancy of the profits being but a chattel could be only in the husband. Bro. Profits 15.

If a feme leases *dum sola* and marries, and the lessee pays his rent to the wife, though no notice of marriage alleged, the payment is ill; and the husband had judgment in debt for the rent. Pal. 210. *Tracy and Dutton*.

Palm. 206.
Cro. Jac.
617, 621.
Wm. Bcon-
loc, 93.

So the husband may sue alone for rent, for not repairing, &c. or other profits or benefits to the estate of the wife; and though he may, he need not join his wife. Cro Car. 338.

Now here the Pernors of the profits demand the rents and profits from the husband who is legal pernor of them, and the design of the act seems as well answered by the husband's taking them as any other.

[675]

But the Court need not give any positive opinion on this point, because the demurrer being general as to all relief, and

and it being possible the court may find it needful to give some sort of relief with respect to these defendants also; and therefore the Court thinks fit that this demurrer as well as the other by *Meredith* be over-ruled; but the plea ought to be allowed.

Case 272 Mackenzie *ver.* Marquis of Powis. In Scacc'.

Decree served on a peer needs no letter missive.
3 Black.
Com. 445.

A DECREE was made against the Marquis of *Powis* for payment of a large sum of money, and he being served with a copy of the decree, and not paying, an attachment went; and it was now moved to discharge the attachment as irregular; because no letter missive was sent before or with the decree that was served; for the defendant being a peer of the realm, a letter is sent to him signed by two Barons, instead of a subpœna, and so it ought to have been now instead of the subpœna which is served upon him, together with the copy of the decree.

This was referred to the deputy remembrancer to report how the practice was; who reported that it was not usual to send such letter before or with the order of court or service of the decree; whereupon the motion was not allowed.

And there seems no reason for what was insisted on; it is well known that the subpœna was introduced Temp. R. 2. When *J. Waltham* bishop of *Sarum* was Chancellor of *England*. *Seld.* When the practice was introduced of sending a letter to a peer instead of such a subpœna, *non constat*. [676] Mr. *Selden* says, 6 vol. 1543, That it was the course in the star chamber of Chancery to pray such letter in a bill against a peer; possibly that practice being begun in the star-chamber on the erection of that Court towards the end of H. 8th's reign might be afterwards followed in Courts of equity. No mention of any process but a subpœna is made in the year books or *Doctor and Student*, but in *West Symb.* sec. 21. it is taken notice of as the course in Chancery. 36 El.

This may be a proper complement before the party is in Court, but when he has appeared and answered, and a decree is against him, it seems more proper to demand obedience to it by process of the Crown, than by letter from the Barons; by the order 35 the direction is general, that

De Term. Pasch. 12 Geo. 2.

that the defendant shall be served with a copy of the decree in person, and a subpoena shall be annexed to it, and served at the same time. In Chancery the subpoena is inserted in the writ itself which contains and recites the decree, and no such letter is sent; but if the defendant disobeys, an attachment and injunction shall go. 2 Vern. 91, 2.

What use can there be of such a letter? Is it to notify the decree to him that he is no stranger to? For he is supposed present in Court by the *subpœna ad audiend' judicium*, and a more full notice of it is given by the copy of it served.

DE

[677]

Term. Sanct. Mich.

13 Geo. 2.

Case 273 Scot qui tam and Bray *ver.* Schawrtz & al in Scacc.
Mich. 11 Geo. 2.

Navigation
by mariners
of Russia
good, tho'
not natives.

INFORMATION was exhibited in the Exchequer by *Scot qui tam, &c.* setting forth, That he seised the ship called the *Constat* in the port of *London*, with its tackle, goods, &c. as forfeited to the use of his Majesty and himself, being imported from foreign parts, when the ship, in which imported, was not belonging to the people of *Great-Britain*, as the true owners, and whereof the master and three-fourths of the mariners are *English*; nor of the built of the country of which the goods were the growth, product or manufacture, or of the port where such goods only can or are most usually first shipped for transportation, and whose master and three-fourths of the mariners at least were of that country or place; whereby the ship and goods were forfeited.

Upon which a writ of appraisement went out, and 22 Oct. 1737, was returned.

On this seisure *Adam Hen. Schawrtz, Samuel Felman,* and *Tho. Zuckerbecker*, merchants of *Riga*, entered their claim; and after Oyer of the information pleaded, that the ship and goods were not imported contrary to the form of the statute.

[678] This issue came on to be tried 29 Nov. 1738, and the jury found a special verdict.

That *Scot* who sues *qui tam, &c.* was surveyor of the act of navigation, and seised this ship and goods 19 Aug. 1737, as not navigated according to the act.

That the said ship set sail from *Riga* in *Russia*, for the port of *London*, with the goods in the information, which

were

were the product of that country, that the ship was *Russia* built; that *Harry Hagson* was master, who was born out of the dominions of the Empress of *Russia*, but Anno 1733, was admitted a burgher of *Riga*, and has ever since continued so, and has been resident there when not engaged in foreign voyages, and traded from thence nine years before the seizure. That there were only 11 mariners on board, of whom four were born in *Russia*, that *Morgan* a fifth was born in *Ireland*, and there bound apprentice to the master, and as such went with him to *Riga*, and three or four years before the seizure served on board the said ship, and sailed therein from *Riga* in the present and former voyages; that the other six mariners were born out of the dominions of *Russia*, but *Stephen Hanson*, one of them, had resided at *Riga* eight years next before the seizure, *Hans Yasper* five years, *Reign Steingrave* four years, and *Derrick Andrews* the cook seven years, and these four during those years had sailed from *Riga* in that and other vessels; that *Riga* is a port where the goods seized can only be, or most usually are, first shipped for transportation.

And if on the whole matter found, the Court think the transportation of the goods in the ship being so navigated be legal, they find for the claimants? *Et si non, &c. contra.*

Upon this special verdict Mr. SOLICITOR GENERAL intimated, that the ship and goods were forfeited by the statute 2 Car. 2. 18, intituled, An act for the encouraging and increasing of shipping and navigation.

This act was meant for the encouragement of the English shipping and navigation, for that is intended in the title, appears by the preamble, which says; For the encouragement of the navigation of this nation; and the principle means to encourage it was by prohibiting the importation or exportation of any goods into or out of his majesty's dominions, but in ships which are of the built or belonging to his dominions, and whereof the master and three-fourths of the mariners at least are *English*.

The only clause in this act the claimants can shelter themselves by, is sect. 8. which saith, that no goods of the growth, production or manufacture of *Muscovy*, or of any countries, &c. to the Great Duke or Emperor of *Muscovy* or *Russia* belonging; as also that no masts, timber, boards, foreign salt, pitch, tar, rosin, hemp, flax, raisins, figs, olives, olive, oils, no corn, grain, sugar, pot-ashes, vinegar, or spirits called *Aquavita* or brandy, shall

be imported into *England*, &c. in ships but such as belong to the people thereof, and whereof the master and three fourths of the mariners at least are *English*; and that no currans or other commodities of the growth, production or manufacture of any of the countries, &c. to the *Ottoman* or *Turkish* empire belonging, shall be imported in any ship but which is of *English* built and navigation as aforesaid, and in no other, except only such foreign ships as are of the built of that country or place of which the said goods are the growth, product or manufacture, or of such port where the said goods can only be, or most usually are, first shipped for transportation, and whereof the master and three fourths of the mariners at least are of the said country or place.

We do not insist but that the ship is *Russia* built, that the goods are the growth of that country; but what we rely on is, that the ship was not manned as the act requires and this depends on two questions.

[680] First, Whether the exception at the end of the clause extends to the whole clause, or only to the latter branch for if it extends not to the whole, then it is plain that the ship was not manned as the clause requires, for it is requisite that the ship, though *Russia* built, should be manned with a master and three-fourths of the mariners *English* which it is evident this was not.

Secondly, Admitting the exception extends to the whole the next question will be, whether by what is found there appears, that the master and three-fourths of the mariners are of that country.

First, Mr. SOLICITOR GENERAL urged (and in the next term Mr. HOLLINGS who then argued more largely) that the exception related only to the last branch of this section, which contains two distinct clauses; the first relates to goods from *Muscovy*; the second to those from the *Turkish* dominions; the first allowed to be imported in the ships of the country whence the goods were brought, whereof the master and three-fourths of the mariners are *English*, the other are allowed only to be imported when the ship as well as the master and three fourths of the mariners are *English* except when both are of the country whence the goods come.

2dly, The first clause allows goods from *Muscovy*, in ships of *Russia*, and only requires the master and mariners to be *English*; the next clause requires the ship as well as the master and mariners

mariners to be *English*; it is most natural therefore that the exception which speaks of both should relate to the same clause that mentions both; there was no occasion to say with respect to goods from *Russia*, except the ship be of that country, for that was before provided for.

Thirdly, If such construction should be made, the *Russia* people would have larger privilege than the *English* themselves; for they might import goods in ships manned either with their own or *English* mariners; but the *English* can import only in ships whereof the master and three fourths of the mariners are *English*.

But supposing the exception extends to both parts of this section, yet what is found by this verdict shews the ship *Constant* was not manned according to the intent of the act of navigation; for it is found that the master and seven of the eleven mariners were born out of the dominions of the Empress of *Russia*; for what can be meant by *them of that country* but those that are born there?

[681]

The words are set in opposition to the word *English*, for the importation of goods was prohibited but in ships *English*, whereof the master and three fourths of the mariners are *English*, except it be in ships of the built of that country of which the goods are the growth, product or manufacture, whereof the master and three-fourths of the mariners are of that country or place; now the word *English* must be meant of the natives of *England*, or at least of such as are naturalized, none else can be called *Englishmen*. A denizen indeed is an *Englishman a parte post*; but all others are aliens, and if an alien continues in *England* at all times after his birth, he does not thereby become a denizen. 1 Rol. Ab. 195. All not born under the king's allegiance, naturalized or made denizen are aliens, and therefore cannot come under the description of *Englishmen*. I delivered the opinion of the Court, and said, that upon this information it may be fit to consider the drift and design of the act of navigation, which was intended, as Mr. Solicitor General observed, to encourage and encrease the shipping and navigation of the *English* nation.

The means proposed as effectual for this end, was, That the importation of all goods from any of his Majesty's dominions in *Asia*, *Africa* or *America* into *England*, *Ireland*, *Wales* or *Berwick*, and the exportation from any of those places into any of his dominions in *Asia*, *Africa* or *America*, should be in ships of the built of and belonging to some of those

[682] those dominions, whereby the master and three-fourths of the mariners at least were *English*. sec. 1.
And so likewise the carriage or removal of them from one port or creek in *England, Ireland, Wales, Guernsey, Jersey, or Berwick* to another. Sec. 6.

2. That no goods whatsoever should be imported into those places of the King's dominions in *Europe*, from *Asia, Africa* or *America*, (tho' not under the King's dominions) but in such vessels, and so manned. Sec. 3.

Thirdly, That no goods should be imported in such vessels so manned, unless shipped from the place of which the goods were the growth, production or manufacture, or in the port where they only can be or most usually are shipped for transportation. Sec. 4.

By these methods all foreigners were excluded not only from the import or export of any goods of the growth or manufacture of *Asia, Africa* or *America*, into or out of *England* or *Ireland* or the adjacent isles, and from carrying them from one port to another in these kingdoms or isles, but were likewise restrained from bringing them into any *European* country for the use of the *English*, since the *English* could not fetch them thence; which must necessarily contribute greatly to the increase of the *English* shipping and seamen.

[683] But as it was the policy of the legislators to prohibit the importation of all goods from *Asia, Africa*, and *America*, (for so in effect it is) unless brought in vessels of the King's dominions, whereof the master and three-fourths of the mariners are *English*; was it their intention to prohibit all *European* goods likewise, unless so imported? No surely, that could not be convenient; and therefore a medium is found out for *European* commodities; none shall be imported from the dominions of the Emperor of *Muscovy* or *Russia*, no masts, timber, boards, salt, pitch, tar, resin, hemp, flax or pot-ashes, which are great part of the traffick from *Denmark, Sweden*, the *Baltic* and *Northern* seas; no raisins, figs, prunes, oil, olives, corn, grain, sugar, wines, vinegar and spirits, which comprehend the chief trade in the *Levant* and other countries of *Europe*, shall be imported, unless in ships belonging to the people of that country whence the goods are brought, and of which the master and three-fourths of the mariners are *English*; nor currans or other goods from the *Turkish* dominions shall be imported, unless in ships *English* built, navigated as aforesaid.

But suppose they will not send these goods in such manner, shall they not be imported? Yes, they may, in ships of the built of that country whence the goods are, in which the master and three fourths of the mariners are of that country or place, but then they shall pay aliens duties. Sec. 8, 9.

This seems the plain intention of the law, to encourage the importers of these goods to make use of *English* shipping and seamen; but in case they have ships and men of their country, the importation is not prohibited, but they may use them paying aliens duties.

So ling, stockfish, pilchards, or other dried or salted fish, not caught in *English* vessels, codfish, herring, oil and blubber from fish, whalefins and whalbones cured, saved or dried not by the people of *England*, may be imported, paying double aliens duties.

Now to bring what has been mentioned to the information.

Two things have been insisted on to support it.

First, That the exception in the end of the eighth section doth not extend to the goods of that country.

Secondly, Admitting it should, yet nothing is found by this special verdict, that shews the master and three-fourths of the mariners are of that country or place whence the goods are brought, as the act requires.

As to the first, it must be admitted, that if the exception sect. 8. does not extend to the whole, but is to be confined to the latter part of that clause, the navigation is not legal; for though the ship *Constant* be *Russia* built, and laden with goods of the growth or manufacture of *Russia*, yet it appears the master and three-fourths of the mariners are not *English*.

But on consideration of what has been urged, which is much I think as could be urged on that point, I think the exception extends to the whole section.

It is a general rule in construction, that where restrictive words are found at the end of the last sentence, which are properly applicable to the several sentences preceding, they shall extend to the whole. 1 Sand. 60. *Gainsford* and *Griffith*.

Now this eighth section contains the provision the legislature thought fit to make in relation to the importation of *European* goods. It might be easily foreseen, that if we restrained the import or export of goods, unless in our own

[684]

2 Keb. 76,
201, 213.
1 S. d. 328.
1 Sand. 58

own ships and with our own seamen, other states might do the like, and that in its consequence would amount to a prohibition of all such goods; which would prove inconvenient; therefore they allowed the importation, but upon these terms, that the goods from Christian countries might be imported in their own ships, having the master and three-fourths of the mariners *English*; those from *Turkey* by our *English* ships and mariners. It was not likely the *Mussulmen*, who have an hatred to the Christian name, should like their ships should be manned by christians; nor was it safe or honourable in respect of ourselves or our religion, to permit our men to man their vessels; and therefore it was proper to prohibit the importation from thence but in *English* vessels as well as with *English* mariners.

[685]

But it was probable, that the Christian as well as the Mahometan countries might be unwilling to suffer such importation to us, unless made with their own men as well as their own vessels; and therefore the exception was added that it might be done by all such foreign ships as are of the built of that country or place of which the goods are the growth, production or manufacture, or where first shipped for transportation, and whereof the master and three fourths of the mariners are of the said country or place.

The exception is indefinite, *such foreign ships*, which has the force of an universal, and must relate to ships from christian as well as infidel countries, and was equally necessary for them, unless it can be supposed the legislature meant to favour the *Turkish* more than the other states of *Europe*.

It was said indeed, there was no need to repeat the words *ships or vessels* in this exceptive part of the clause and therefore since *Turkish* goods were not to be imported but in *English* ships and with *English* mariners, by the latter branch of the section, the exception which speaks both of ships and mariners, ought to be confined to the latter branch.

But this does not follow; it is true the other states of *Europe* are allowed before to import in their own ships with an *English* master and mariners; the *Turkish* not, unless the ships too be *English*; the exception therefore must necessarily mention ships as well as mariners of the country where the goods came; and though it was needless with respect to other *European* states, yet it could not be avoided if the same liberty was intended for both *Turkish* and Christian countries.

countries, unless there had been a larger tautology by repeating twice the same exception, once without the words *ships and vessels*, and afterwards with them.

But it was insisted, That by this construction the importers of goods from *Muscovy* would have more privilege than the *English* themselves; for these could import only in *English* vessels and *English* seamen, whereas they could use either such, or vessels of the country whence the goods come; this indeed is specious, but if you consider the drift and design of the law, which was the increase of *English* seamen, and it is a sure means to augment the numbers and skill of our mariners to have them man foreign as well as their own country vessels, in case care be taken to call them home when our own occasions require them.

But this construction is made very plain by the next section, 9, where the goods of *Muscovy* and all mentioned in the sect. 8. as well as the *Turkish* commodities imported in other than such shipping, and so navigated as aforesaid, are declared to be aliens goods, and liable to the same customs and duties.

[686]

Secondly, The next question then will be, Whether by what is found it appears this ship in the information was manned as the act of navigation requires.

And this depends upon the meaning of these words, *whereof the master and three fourths of the mariners are of the said country or place.*

What is meant by the words, *Whereof the master and three fourths of the mariners are English*, seems to be explained by the act itself; in sect. 2. it is said, *No alien born, unless naturalized or made denizen, shall use the trade or employment of a merchant or factor in any port of his Majesty's dominions in Asia, Africa, or America.*

So in sect. 6. it is said, no persons shall load on any bottom, &c. of which any stranger or strangers born (unless such as be denizens or naturalized) are owners, part-owners or master, any goods to carry from one port to another; which imports, that none can be looked upon as *English* but such as are natives, naturalised or denizens.

And it is certain, that by the laws of *England* all others are esteemed aliens, and are not intitled to all the same privileges and advantages that other *Englishmen* have.

And though an alien continuing in *England* shall not become so much as denizen, tho' the continuance be ever so long, as was held in the case cited 1 Rol. Abr. 195.

whence

[687]

whence it was inferred that the words, *those of other countries*, being set in opposition as it were to (*English*) ought to be natives of that country, or at least what is tantamount; yet it does not appear that any antithesis, or direct opposition was designed by the expressions used in the act; our laws in relation to aliens were perhaps, as Mr. *Spellman* thinks, originally a branch of the feudal law, where none could hold lands without being obliged to swear fealty to his lord; which a foreigner under the allegiance of another Prince could not be supposed able to perform.

In the case of *Collingwood* and *Pace*, 1 Vent. 17. Holt Ch. Justice says, the law is the measure of the disability of aliens, and the only rule to determine how far it extends; so that we cannot reasonably argue from the authorities in our law concerning aliens, as to ability of persons in other countries, and what shall denominate them to be persons of that country or not.

The methods of denization and naturalization used with us are not known in other countries. Ch. J. Holt quotes *Terrien*, to shew that they in *France* naturalize according to the laws of *Normandy*. 1 Vent. 419. But that is in a different manner from us, where it can be done only by parliament.

Domat. Vol. 2. Suppl. to the Civil Law, l. 1. tit. 2. s. 2. art. 9, it is said, that if foreigners desire to fix their habitation in *France*, and enjoy the rights and liberties peculiar to the subjects thereof, the favour is granted by letters of naturalization obtained from the King, which are called so, because those who obtain them are reputed by the effect of the said letters to be as natural-born subjects of *France*.

But on the trial of this information, it was proved by a witness, who seemed acquainted with the dominions of *Muscovy*, that no such thing as naturalization was known or practised there.

[688]

The best method we can take to find out whom the legislators intended should man foreign ships that imported goods hither, may be to resort to the act itself, and see what can be collected from thence.

Now the sect. 8, which speaks of the importation of goods from *Muscovy*, and other *European* countries, says, they must be in ships that truly and *bona fide*, belong to the people thereof; and by the conclusion it says, the master and three fourths of the mariners must be of that country, that is, they must be people of that country.

Who shall be said people of that country the act does not directly determine, but seems to use the words in as large

1 Sid. 193.
1 Vent. 413.
1 Lev. 59.
1 Keb 65.
174, 216.
535, 579.
585, 603.
670, 699.
850
Vaugh.
274.
2 Jon. 10.
2 Keb. 601.
Cart. 185.
2 Sid. 23.
51, 184.
2 Vent. 1.
1 Eq. Abr.
213. c 19.
3 Lev. 412.
Denization
is by the
king's letter
patent.
Braet b. 5.
tr. 5. c. 25.
2 Inst. 741.
See stat. 12
W. 3. c. 2.
1 Geo. 1.
c. 4.
Naturaliza-
tion is by
act of par-
liament.

large a sense as if it had said the inhabitants of that country, without any precise designation of natives or not.

So Sect. 4. that speaks of ling, pilchards and other dried and salted fish, usually fished for and caught by the people of *England, Ireland and Wales*, must denote the inhabitants of those kingdoms generally, whether natives or not.

So when it says, codfish, herrings, oil and blubber made of fish, when imported into *England, Ireland and Wales*, not being caught by vessels belonging thereunto, and the fish cured, saved and dried or made by the people thereof, shall pay double aliens customs, it must mean the inhabitants thereof generally, for it cannot be supposed the legislature meant that if the fish were cured and dried by inhabitants not natives, or the oil or blubber made by such, the importer should be excused by the double duties.

So where the sect. 16 speaks, that the act shall not extend to fish caught, saved and cured by the people of *Scotland*, imported from *Scotland*, in *Scotch* vessels, the master and three-fourths of the mariners being his Majesty's subjects; must it be inquired whether the fish were caught by natives of *Scotland*, before it be known whether the ship and goods were forfeited or not.

The intent and design of the act therefore seems to be, that no foreign ships should import any of the goods specified in this section, if they sent for mariners from any foreign kingdom or state to man them; but they might be allowed to import them if the master and three-fourths of the mariners were *English*, or those who dealt in their own country.

[689]

It does not indeed precisely fix and determine who shall be said the people of a country, but it gives it a larger extent and signification than what is meant by the natives of a country, but the precise notation of it is left to the general import and common understanding of the word.

Now by the civil Law, which is used in most parts of *Christendom*, and may not improperly be considered on this occasion, it is said, *Just. Int. lib. 1. tit. 2. Appellatione populi universi cives significantur*; the word *civis*, taken in the strictest sense, extends only to him that is intitled to the privileges of the city of which he is a member. And in that sense there is a distinction between a citizen, and an inhabitant within the same city for every inhabitant there is not a citizen; *cives quidem origo, manumissio, adjectio, vel adoptio, incolae vero domicilium facit*, saith *Eadl. l. 10. tit. 1. 7. So Dig. l. 9. tit. De verbor' significatione, 239. loca loci est, qui in aliqua regione domicilium suum constituit.*

It

It is fit therefore to consider how the matter stands as to the master and mariners in the ship mentioned in the information.

First as to *Harry Hagson* the master (for if he be not qualified the navigation is illegal) it is found to him, that he in 1733, became a burgher of *Riga*, and has ever since continued so; that for nine years he has been resident there, unless when he went in foreign voyages.

Now I am of opinion, that he is sufficiently qualified to man the ship.

[690] It is true, he is found to be born out of the Empress of *Russia*'s dominions, but he has been resident there nine years, and in 1733, was made a burgher of *Riga*.

Now if his birth under the dominion of *Russia* be not necessary, there can scarce any thing be thought more cogent to denominate a man of that country, for being a burgher there he must of course take oath of allegiance to the Empress, as it appeared on the trial he had done, although the evidence of it was not admitted to be read, it being only a certificate of it without a proper attestation:

He must therefore be a subject of the Empress, which is all contended for on the last argument as needful to denominate him of that country.

Stat. 14 &
15 Hen. 8.
ca. 4. sec.
2.

By the statute — H 8. — a person sworn to a foreign prince is looked upon as a stranger to his native country, and shall pay aliens duties.

The greater difficulty will be in regard to four other of the mariners, one of whom is said to have resided at *Riga* eight years, another seven, another six, another only four years before the seizure, and during these years to have sailed from *Riga* in this and other voyages.

Now I am of opinion these are men of that country within the intent of the act of navigation. First, Because the act seems to intend by people of a country any that are settled and fixed inhabitants there; and when it mentions mariners of the said country or place, it still speaks more loosely and generally, and consequently a residence of four, six or eight years may well satisfy that expression.

Secondly, This seems to answer the design of the act which was not to create difficulties in other countries by finding mariners among themselves, as to prevent their supplying themselves with any mariners from other states but *English*.

[691]

Thirdly

De Term. S. Mich. 13 Geo. 2.

Thirdly, Because by the Civil Law, such a residence gives the country a right to their service, *qui originem ab urbe Roma habent, si alio loco domicilium constituerunt, numera ejus sustinere debent.* Dig. l. 50, tit. 4, lex 3.

So Cod. l. 10. tit. 39, l. 5, 6. *Si in patria uxoris tuæ vel qualibet alia domicilium defixisti, incolatus jure ultro te ejusdem civitatis muneribus obligasti, privilegio speciali non intervenient, tamen originis ratione ac domicilii voluntate ad munera civilia quemq; vocari certissimum est.*

Fourthly, The special verdict does not find these persons had ever any residence or habitation (since they were grown up) in any place out of the dominions of *Russia*; it is found indeed they were born out of the dominion, but that they dwelt or resided any where else so long as they have done in *Russia*, does not appear, and what does not appear is not to be intended.

It is found that they made several voyages from *Russia*, but it does not appear that they ever made any voyage from any other country whatsoever; so that they may be properly said to be mariners of *Russia*, but there is no foundation to say they were ever mariners of any other country or place.

And it is not inconsiderable (which was an observation of Baron WRIGHT's) that the act of navigation requires only that foreign vessels be manned by a master and three-fourths of the mariners which are of the same country; it does not say by mariners born in that country or brought up there, but mariners of that country, which is a denomination they must acquire long after their birth, for they could not be born mariners, and if they are of that country while they are mariners, and never were mariners of any other country, it seems fully to satisfy the words and intent of the act.

It is an usual distinction in most countries and states to distinguish between the inhabitants of the land and strangers; in *Greece* they distinguish between their πολιται, μετοικοι, & ξενοι, their citizens and sojourners, as the Archbishop Potter calls them, Arch. Græca, cap. 9.) and strangers; the μετοικοι were born in some foreign country, and came to settle in *Greece*, and were liable to pay tribute and perform some duties, but not capable to bear office or intermeddle with affairs of government.

So the Civil Law distinguished between *originarii* and *incole*, and those who have not a fixed abode, but were strangers

strangers there, *cum neq; originales neq; incolae vos esse memoratis ob solam domus vel possessionis causam, publici juris auctoritas vos muneribus obligari non finit.* Cod. 10. tit. 39. l. 4.

So in our Law the like distinction is made between settled inhabitants of any parish and places and those that are not so. 2 Inst. 702.

But it was insisted, that they ought to be subjects at least to the Empress of *Russia*; how does it appear they were not so? It is not found they were not, or that they were subjects to any other prince; upon the trial it appeared they were *Swedes* by birth, but whether born in that part of *Sweden* which came under the dominion of the Czar or elsewhere, is not found; if conquered by the late Czar, they are since become his subjects. *Gro. de jure B. & P.*

Hob. 270.
Poph. 149.

But if the laws of *Russia* are not contrary in this respect to ours, by their being resident there they owe a local allegiance. *Courteen's case per Hob.* in an information against *Dutchmen* for transporting money, it was said, that they were subjects, owed allegiance to the King; if they committed high treason, the indictment must say *cont' domin' suum*, though not *naturalem domin' a contra debit' ligeantia*.

Jenk. 306.
[693]
Ld. Ray.
1.

So 7 Co. 1. *Calvin's case*; and this was agreed, and that in all indictments for high treason the omission of *cont' ligeantiae suae debit'* was error, which was after affirmed in the House of Lords. *King and Queen versus Tucker*, 4 Mod. 163. Ca. Parl.

But it was urged, that by this construction the act might be eluded; foreigners might stay a day or two, and then man their vessels; for if residence for two or three years will suffice, why not for two or three weeks or two or three days; where will you stop?

But there is no consequence of this can be drawn from what is said, for if that was specially found, it might alter the case; that would be an artifice or fraud to evade the act; but nothing of this nature is found, which in a penal act must be, or it cannot be intended.

By the civil law a bare habitation does not make any to have *jus incolatus*, it must be where a man *domicilium constituit, ubi larem summamq; rerum habet, unde si discedit peregrinari incipit, & cum redit peregrinari desinit*; and such not liable to charges or offices *ut incolae ad munera subeunda vel honores capeffandos non astringuntur.* Cod. l. 10, tit. 39.

By

By the common law, habitation for a year and a day was requisite to make a person settled there ; but upon the whole it would be almost impracticable and make commerce very hazardous if every merchant was to search out the nativity of every mariner he employed, and in case of mistake or misinformation was to forfeit his ship and cargo. And as no such construction appears hitherto to have been made of this act since the passing of it, the Court gave judgment for the defendant.

[694]

The Governors, Bailiffs and Commonalty of the Company of the Conservators of the Level of the Fens, *ver.* Thomas Hare. In Scacc'.

Case 274

BILL for an injunction to stay proceedings on an ejectment for lands in *Norfolk*, brought on the demise of Sir Thomas Hare, after verdict for the plaintiff.

Bill for discovery of matters prevalent at law not proper for relief in equity.

And it appeared by the bill and answer, that Anno Domini 1665, the adventurers of the fens in Com' *Norfolk*, made two great drains in the *Level* called ——— one whereof was called the 20 foot drain ; and after in the same year they were incorporated by the name *Sup.*

That by articles of agreement made 12 April 1680, int. Sir Thomas Hare, father of the now defendant, and George Dashwood, Esq. on his marriage with Elizabeth, daughter of the said George Dashwood, in consideration of 12,000*l.* to be paid for clearing the debts of Sir Thomas on his manors and estate in *Stowbardolph* and *Wimbotsham* in Com' *Norfolk*, which Sir Thomas covenants to employ accordingly, and to settle the said manors and estate for a jointure and provision for her, and in lieu of dower, to the use of him and the said Elizabeth during their lives, subject to a condition that if Sir Thomas should die leaving his wife and an heir male or males of their bodies then living, she should have his estate in *Suffolk* and *Essex* for her life, instead of the manor of *Stowbardolph* and estate there, and a bar of her dower ; and on conveying the estates, George Dashwood covenants she should surrender and release her interest in *Stowbardolph* to and for the use of such male or males so living ; but if Sir Thomas died leaving no issue male, Elizabeth should enjoy the estate in *Stowbardolph* and *Wimbotsham* for her jointure, notwithstanding the said proviso ; and the estates in *Suffolk* and *Essex* should be sold for

[695] for daughter's portions, if any; and Sir *Thomas* covenants, that from marriage, till manors, &c. in *Stowbardolph* and *Wimbotsham* should be settled by law according to intent of articles, he would stand seised of the estate in *Suffolk* and *Essex*, to the use of *Elizabeth* for life.

That by indentures of lease and release 6 and 7 Oct. 1682, in consideration of the said marriage had, 13000*l.* portion (1000*l.* more being paid pursuant to the articles on birth of first child) and for settling the lands after mentioned for jointure of *Elizabeth*, and for uses after expressed, and in pursuance and for full performance of the articles before marriage, the said Sir *Thomas Hare* conveys the said manors of *Stowbardolph* and *Wimbotsham* and several other manors in *Com' Norfolk* to *George Dajbwood* and — *Brady* and their heirs, to the use (as to manors of *Stowbardolph* and *Wimbotsham*) of himself for life, and then of *Ralph* his eldest son and the heirs males of his body, then to the use of second, third and all other sons of that marriage in tail male; then to the right heirs of Sir *Thomas*.

And as to the other lands in *com' Norfolk*, to the use of Sir *Thomas* for life, then to *Elizabeth* for life for jointure then to Sir *Thomas* and heirs.

By indenture of lease and release 21 and 22 July 1686 Sir *Thomas* conveys 339 acres of fen-land, parcel of said manor of *Stowbardolph* to *Chr. Crutford* and *John Milbourne* in fee, in trust for the level.

By indenture 22 July 1686, reciting agreement to sell 339 acres for the benefit of the level, paying 537*l.* 10*s.* and that such conveyance was made, but it appearing doubtful whether Sir *Thomas Hare* had at present any power to make such conveyance, Sir *Thomas Hare* agreed to give security for a good assurance of the 339 acres within 11 years, from all claiming in remainder, &c. and thereby demises an estate of 40*l.* *per ann.* to them for 99 years, on condition to be void on making such assurance.

[696] That Sir *Thomas Hare* died — leaving issue *Ralph* and *Thomas*; that *Ralph* died without issue, whereby the estate descended to Sir *Thomas* the lessor of the plaintiff.

On this case it was insisted for the plaintiff in equity, that at the trial the settlement was produced, but not the articles; but it being therein mentioned, that the settlement was in pursuance of articles, the plaintiff had a verdict; by the articles being since discovered by the answer of Sir *Thomas Hare*, it appears that the settlement was made subsequent

sequent to the marriage, and quite variant from the articles, and consequently will not avail against a purchaser for a good and valuable consideration, as the conservators of the fen, appear to be, but such a voluntary settlement is fraudulent; and altho' they could not take advantage of it at the trial, not having the articles to produce; yet now they (being produced are proper in a court of equity to take advantage of it, and the Court ought not to permit the plaintiff at law to proceed upon this verdict, which now appears to have been gained contrary to conscience.

That the articles only took care to secure a jointure for the wife for her life; and although the settlement should be good with respect to her jointure, yet in case any remainders be limited voluntarily after estates on good and valuable consideration preceding, such limitation of remainders without consideration will be void in regard to a purchaser, by force of the statute 27 Eliz. — although the preceding estates stand good against him; and so it was resolved 2 Lev. 147. Lane 22. 1 Vern. 285-6.

That it is not material, that the purchasers had notice of this settlement in 1682, for where a voluntary settlement becomes void by force of the statute 27 Eliz. it will be so, notwithstanding the purchaser had notice of such settlement; and so it was held 5 Co. 60. Vide 2 Lev. 105.

This case having been spoken to at large, the Court took time to consider of it till next term, and had copies of the articles and settlement laid before them for their consideration in the mean time; and this Court in Hillary term decreed, that the plaintiff's bill should be dismissed without costs.

The reasons why the Court dismissed the bill were, that the bill was only for discovery, and an injunction to stay the proceedings at law.

That the plaintiff had a discovery of the articles made before the marriage of Sir Thomas Hare, whereby they had in reality the fruit of their suit; that the bill made not out any case to intitle them for relief; what was prayed in relation to an injunction was general to stay all the defendant's proceedings at law; it cannot be desired the Court should grant a perpetual injunction to stay for ever all the defendant's proceedings at law for the future, where the matter was properly triable at law.

Rudge

Where im-
material
for pur-
chasers to
have notice.
Co. Lit. 3,
b. 76, a.
290, a. b.
[697]
3 Co. 82, b.
Moor 605,
615.
Bridg. 23.
Palm. 217.
Lane 22.
2 Jones 95.
See Stat. 3
& 4. Wm.
& Mar. c.
14.

Case 275 Rudge and James Hopkins, Plaintiffs, *ver.* Robert Chapman, clerk, Robert, bishop of Peterborough, John Hopkins, Christopher Hopkins, and 33 inhabitants de Braybrook in com' Northampton.

Bill to establish modus, when proper.

A BILL was exhibited by plaintiff, setting forth that the plaintiff *Rudge* and *John Hopkins* deceased, were seised in fee of certain lands, lately purchased by them in the said county, without any benefit of survivorship; that they were sued by the defendant as rector of the parish of *Braybrook* for the tithes of the said purchased lands; who by answer insisted, that *Robert Chapman*, the plaintiff in that cause, held and enjoyed a parcel of meadow land, called *The Dale*, in lieu of all tithe hay arising upon the said purchased lands.

[698]

That after issue, and examination of witnesses, the cause was brought to hearing 4 Nov. 1731, and on hearing, the plaintiff's bill was dismissed with costs.

That *John Hopkins* by will 10 Novem. 1729 devised his moiety of the purchased premisses to the plaintiffs *J. Rudge* *James Hopkins* and Sir *Richard Hopkins* and their heirs, upon certain trusts therein mentioned; that the plaintiff *John Rudge* refusing to act, by decree in Chancery released to the other trustees, and Sir *Richard Hopkins* is since dead; whereby the plaintiff *James Hopkins* is become the only surviving trustee of the will of *John Hopkins*.

So the bill prays that this modus may be established by the decree of the Court.

It was not proper to pray such decree, because the plaintiffs have not made proper parties; first, The modus alledged is, that the rector enjoyed all the meadow called *Dale*, in lieu of all the tithe hay arising in that parish, and all the land-owners of that parish are not made parties. *Sed non allocatur*; for *Hawkins* and the 33 other defendants are named to be the land-owners of that parish, and altho' it is not said they were all the land-owners, *non constat* there are any others, and if there should be, they cannot be bound by the decree, and it shall not be intended, unless it had appeared.

Secondly,

Secondly, It was said that *Rudge* is intitled to an undivided moiety of the purchased lands, and the other plaintiff is only the surviving trustee of the other moiety, but upon what trusts does not appear, and the *cestui que trust*, is not before the Court.

To which it was answered, the plaintiff is trustee for persons not in *esse*, and it was declared in the House of Lords by Lord HARDWICK, that persons not in *esse* might be bound by a decree; that it had been settled lately in Chancery upon Mr. *Hopkins's* will, that till the *cestui que trust* appointed by the will should be in *esse*, the estate descended to the heir at law, who was made a defendant and did not oppose the decree; and being defendant, though no decree can be for him, yet it would be mischievous if any, refusing to be plaintiff, should hinder him that hath a joint interest with him from suing for his right; and it was therefore always thought sufficient to name him a defendant, as he was in this case; but of this the Court took time to consider.

[699]

It is to be observed, that the plaintiff comes for a favour, not for the recovery of a right; if the plaintiff should sue for tithes in specie again, the plaintiff might bar his demand by the same means as before, and it is unlikely the defendant should again attempt an unsuccessful suit.

Bills of peace are proper in equity, but it is where the right has been settled at law by a trial, and appears to be on a good foundation.

Secondly, It does not appear by the bill what interest the person hath in the meadows of *Dale*, whether he and his successors were to enjoy it.

Thirdly, That the plaintiff is intitled to a moiety only of the estate claimed to be exempt.

[700]
Case 276

Theodosia Skirme, Widow, Executrix of Thomas Skirme her Husband, who was Executor of William Wogan, so he was Executor of Dame Mary Wogan the Widow and Administratrix of Sir William Wogan, and also Executrix of Viscountess Purbeck her Mother, Plaintiff, against Essex Marychurch Meyrick, Esq. Son and Heir of John Meyrick, Frances Meyrick, Gent. John Simmons, John Wogan and John Langhorne, surviving Executor of Anne, Widow and Executrix of John Langhorne who survived Francis Morgan, the Trustees in the Settlement. 2 April 1710. In Scacc.

A person deemed a trustee, if he takes an inheritance after notice of articles to settle the estate. Statute of limitation when pleadable to a trust.

PLAINTIFF by his bill suggests, that *Griffith Lewis* and *Sarah* his daughter, having mortgaged lands in *Com' Carmarthen* to *Sir William Wogan*, after the decease of *Griffith* and *Sir William Wogan*, *John Thomas*, and the said *Sarah* his wife, daughter and heir of *Griffith Lewis*, by indenture 26 Jan. 1709, and by fine, in consideration of 1769l. 5s. due on the said mortgage, conveyed the lands, being 80l. *per ann.* to dame *Mary Wogan*, widow and administratrix of *Sir William Wogan*, and her heirs.

Bill was filed Mich. 17 5.

[701]

That by indenture 2 April 1710, dame *Mary Wogan* reciting, *Sir William Wogan* intended by will to direct his personal estate to be laid out in lands, to be settled on his nephew *William Wogan*, and after on *Lewis Wogan*, to continue it in his name, but died before will made, whereby moiety of the said personal estate belonged to dame *Mary Wogan* his widow and administratrix, the other moiety to his nephew *W. Wogan* and *J. Simmons*; and that she was desirous all parts of the said personal estate belonging to her and the nephew *W. Wogan* should be settled according to the intent of *Sir W. Wogan*, and that she was executrix of *Lady Elizabeth Viscountess Purbeck*, her mother, and residuary legatee; and that *L. Wogan* had agreed to find her house, diet, &c. suitable to her quality, fire, coach, two maids, two servants to attend her on horseback during her life; out of her regard to the memory of *Sir William Wogan*

gen, and to perform his intent to the said *L. Wogan*, and that he may not be wholly deprived of the benefit of the personal estate accruing to her, and judging it not reasonable or just *W. Wogan* should have the benefit of it, in regard he neglects to share of it pursuant to such intent, and being minded to settle all the personal estate of Lady Viscountess *Purbeck* to the use of the personal estate of Sir *W. Wogan*, by *J. Langhorne*, and *James Wogan*, in behalf of *L. Wogan*, and that *L. Wogan* has agreed to allow her diet, &c. as aforesaid, grants and assigns to *J. Langhorne*, and *James Wogan*, all her moiety of all the chattels real and personal of Sir *W. Wogan*, and Lady Viscountess *Purbeck*; To hold to them, their executors, administrators and assigns, in trust for paying the debts of Sir *W. Wogan*, and out of his and Lady *Purbeck*'s personal estate to pay 300l. to Lady *M. Wogan*, for satisfying her debts and Lady Viscountess *Purbeck*'s, and then debts of *Lewis Wogan*; and the residue to lay out in a purchase of lands, to be settled to the use of *Lewis Wogan* for life, with power of waste; then to *W. Wogan* his eldest son in tail male, then to the use of every other son of *Lewis Wogan*, then to the use of him and his heirs.

Dame *M. Wogan* covenants she hath not done nor will do any act, whereby the personal estate of Sir *W. Wogan* or Lady Viscountess *Purbeck*, may be lessened, &c. or not quietly enjoyed by *J. L.* and *J. Wogan*, she covenants to make further assurance of all the moiety of Sir *W. Wogan*'s personal estate, and of the said *Elizabeth*, Viscountess *Purbeck*; *Lewis Wogan* covenants to indemnify her from charges of all suits about the said personal estates, and to provide her meat, &c. coach, and two servants to attend her, and two maids, and diet, &c. for them during her life.

[702]

And if *W. Wogan* settle his share of Sir *W. Wogan*'s real and personal estate to the same uses Sir *W. Wogan* intended by his will, the estate to be purchased by *J. L.* and *W. W.* shall be settled to the same uses.

That *Lewis Wogan* maintained dame *M. Wogan* till his death 26 Nov. 1714.

And *J. Meyrick* and *Fran. Meyrick*, were her counsel and factor in preparing the said deed 2 Apr. 1710, by virtue whereof *Lewis Wogan* became intitled to and enjoyed the estate purchased by dame *M. Wogan* during his life.

Q q 2

That

De Term. S. Mich. 13 Geo. 2.

That *L. Wogan*, trustee in the settlement 2 Apr. 1710. died in the life time of *L. Wogan*, and *J. Langhorne* the other trustee died and made *Anne* his wife executrix, who made *J. Meyrick* the defendant, *J. Langhorne* and *W. Bowen*, executors.

That *Lewis Wogan* left issue *W. Wogan* and *J. Wogan*, both infants, after whose death *J. Meyrick*, and *Fran. Meyrick*, or one of them, entered on behalf of *W. Wogan*, the eldest son of *Lewis Wogan* then an infant, into the lands so purchased by dame *M. Wogan*, 1709, with personal estate of Sir *W. Wogan*, and ought to account for the same to his representatives till his death, which happened 20 Mar. 1728.

That dame *M. Wogan* as administratrix of Sir *W. Wogan* was possessed of a lease of the tithes of *Llangadock*, granted by the bishop of *St. David's* 100l. per ann. into which *J. Meyrick*, or *F. Meyrick*, entered, and received the profits for *W. Wogan* the infant, *F. Meyrick*, acting as agent for *Anne Langhorne*, and her executors.

[703] That dame *M. Wogan* having an annuity or rent charge granted her for her life by Sir *W. Wogan* of 200l. per ann. out of lands in *Pembrook*, *Carm'* and *Cardigan*, confessed judgment to *J. Meyrick*, M. 4 Geo. in the Court of Exchequer for 578l. on pretence of monies due to him for two years board, which he agreed to accept out of the arrears of the said annuity, which he received from Mich. 1714 till her death 26 Nov. 1724.

That dame *M. Wogan*, made the said *W. Wogan* her executor and residuary legatee, who by will devised all his real estate to *J. Wogan* and his heirs, and made *Tho. Skirme* husband of the plaintiff his executor and residuary legatee, who 1731. made the plaintiff his executrix and residuary legatee.

That *F. Meyrick* never accounted for interest by him received from Mr. *Harley* for 1100l. due to Sir *W. Wogan* on mortgage, viz. 50l. 20 July 1716. 50l. on the 7th of Mar. 1717. 50l. on 29 July 1718. 120l. on 21 Dec. 1719. That *J. Meyrick* died 1731. having made defendant *Eff. M. Meyrick*, and *F. Meyrick* account with her for the profits of the estate in Com' *Carm'* from the death of *Lewis Wogan* to the death of *W. Wogan* his son.

Secondly, That *F. Meyrick* account for tithes of *Langadock* by him received during that time.

Third

De Term. S. Mich. 13 Geo. 2.

Thirdly, That he would account for interest of 1100*l.* by him received of *Edward Harley*, Esq.

Fourthly, That defendant set forth what was due to *J. Meyrick* to whom judgment was given from dame *M. W.* and whether he be not satisfied the same out of the arrears of her annuity of 200*l.* by him received, or other estate, and if any thing remain due on it; that *J. Wogan's* tenement called *Sander's* tenement, devised to him by *W. Wogan*, may go toward satisfaction.

That *J. Simmons* devisee of *W. Wogan*, the nephew of Sir *W. W.* to whom the land out of which the 200*l.* *per ann.* issues was given, may account for the arrears of the said annuity.

[704]

Defendant *Essex M. Meyrick*, by answer admits that dame *M. Wogan* by indenture 20 & 21 June 1715. conveyed the lands in *Com' Carmarthen* to *J.* and *Fra. Meyrick*, and their heirs for 50*l.* and out of kindness to them, and that they had from that time received the profits.

That dame *M. Wogan* dwelt at *J. Meyrick's* house two years and a half, and after 5 Aug. 1716, went to dwell at *Haverford West*, and being indebted for her board there in 25*l.* 10*s.* and to *Fra. M.* 32*l.* on 9 Oct. 1717. executed a warrant of attorney to confess judgment in the exchequer for securing that money, viz. 28*g**l.* which is still due, and the judgment was entered up.

And the defendant *F. M.* admits the mortgage from *G. I.* and his daughter was made for 1200*l.* the money of Sir *W. Wogan*, to *W. Wogan*, Esq. and *Welly* as his trustees, and on her purchasing the inheritance she insisted on 100*l.* more than what was due for principal and interest on mortgage; that *J. Meyrick* and he were privy to her purchase, and as to the deed 2 April 1710, but took not her purchase to be included in the deed.

Fra. M. also admits, that by authority from dame *M. W.* he received several parts of the personal estate of Sir *W. W.* and Lady *Purbeck*, but 21 Dec. 1717. stated accounts with her, when due to him on the balance 207*l.* 3*s.* 5*d.* in which account the rents of the tithes of *Langadock* were included, and that 282*l.* 1*s.* 10*d.* being due to him from *J. Simmons* the other nephew of Sir *W. Wogan*, which he might receive out of the share of the personal estate of Sir *W. Wogan*, payable to him by dame *M. W.* she agreed the defendant should receive both sums
out

[705] out of what he should after receive out of such personal estate, and the rents of the said tithes, for which he submits to account.

That by deed 9 Oâ. 1717, (same day with warrant of attorney to confess judgment) reciting the indenture 4 July 1716. whereby dame *M. Wogan* had given *J. Meyrick* 1000*l.* to be received out of the arrears of her annuity, and agreed to pay him 100*l.* *per ann.* for her board, and had given all monies due to her from any person, except a debt from *Thomas Cornwallis*, ratified the said gifts, and released the future payments of 100*l.* *per ann.* and she covenanted to pay the 284*l.* for which warrant of attorney was given out of the said arrears.

On hearing this cause it was first objected, that here was want of parties, because the mortgage made by *John Thomas*, and *Sarah* his wife was to *W. Wogan* and — *Welly* for a term, and no declaration of trust appearing for Sir *W. Wogan*, they ought to have been parties.

Sed non allegatur ; for the account demanded by the plaintiff against the defendants, is of the rents and profits of the estate of Sir *W. Wogan*, and of this mortgaged land as part of Sir *William's* personal estate ; and the defendants admit, that the money put out on this mortgage was part of Sir *W. Wogan's* money, and the names of *W. Wogan* and *Willy* were used as trustees for him ; but insisted, that dame *W. Wogan* purchased the inheritance of this estate, and conveyed it to them in 1715, whereas the plaintiff insists she had before agreed to carry it to *Thomas Lewis*, whose representative she is ; so the whole question between the parties is, Whether this estate in *Com' Carmarthen* belongs to those who claim under the deed 1710, or the parties to whom conveyed in 1715 ? And whatever is determined in this question, cannot affect *W. Wogan* or *Willy*, for they will not be bound by the decree ; and if not trustees for Sir *W. Wogan* cannot be affected by it ; for it is a known rule, that none can be bound by the decree but such as are parties or privies to the suit.

[706] And it would be hard to dismiss the plaintiff for want of parties, where the defendants admit the plaintiff proper to make the demand against them, in case the ground on which the demand is founded be true, and none can be prejudiced, who are not parties, by the decree of the Court upon that point.

Afterwards

Afterwards, at the sittings after Hill. term, the cause came on to be heard upon the merits.

And the first part of the plaintiff's demand was, an account of the profits of the estate in *Com. Carmarthen*, from the death of *Lewis Wogan*, which was 26 Nov. 1715, to the death of *W. Wogan* his son 20 Mar. 1728; for the plaintiff being representative of *W. Wogan*, on whom the personal estate of Sir *W. Wogan* was agreed to be settled after his father's decease by the indenture 2 April 1710, was intituled to this estate, which was a mortgage to *W. Wogan*, though conveyed to dame *M. Wogan*, in 1729, and by her conveyed to *James* and *Francis Meyrick*, and their heirs, by indenture 20 and 21 June 1715; for *Meyrick* having notice of this settlement 2 April 1710, took the profits subject to the trusts of that deed, and consequently his executors *Essex M. Meyrick*, and *F. Meyrick* ought to account for the profits by him received in the life of *W. Wogan*.

Now it appears, that by the deed 2 April 1710, dame *M. Wogan* admits by the recital, that Sir *W. Wogan* designed all his personal estate should be laid out in land to be settled in his name; that she in respect to his memory importuned his nephew *W. Wogan*, that all the parts of the said Sir *William's* personal estate belonging to her and him might be so disposed, but he refuses; that she was minded to settle all the estate of Lady Viscountess *Purbeck* and her moiety of Sir *W. Wogan's* personal estate; and therefore of intent to settle such part of the personal estate as belongs to her, she assigns all her moiety of the judgment, mortgages, &c. and all and singular other real and personal estate of Sir *W. Wogan* and Lady *Purbeck's* personal estate, upon the trusts therein mentioned, and covenants she had not done, nor would do any act by means whereof the personal estate of Sir *W. Wogan* and Lady *Purbeck* are or shall be lessened, impaired, &c. or defeated.

[707]

It is evident by these words, the whole personal estate of the said Sir *William Wogan* was agreed to be settled upon the trusts of this deed; and it is plain upon the proofs in the cause, that *Lewis Wogan* took the profits of this estate in *Com. Carmarthen* while he lived: that the inheritance was conveyed to Lady *Wogan* on the consideration of what was due on the mortgage for a term of years to *William Wogan* and *Welly*, trustees for Sir *William Wogan*, and consequently was part of his personal estate; and though 1 col. is said to be

he insisted on, yet nothing more appears to be paid for the purpose of such inheritance; that *John* and *Frances Meyrick* were privy to, and preparers of the deed 2 April 1710.

So there can no doubt be, but that on bill by *Lewis Wogan*, or his son *William Wogan*, against *John* and *Francis Meyrick*, (admitting this deed 2 April 1710, was made on good and valuable consideration) a court of equity would have decreed this estate to have been conveyed to the trustees upon the trusts of that deed.

It was insisted, that *Lewis Wogan* is to be considered as a purchaser; for the deed by *Lewis Wogan* 2 April 1710, was out of respect to the memory, and to fulfil the design of Sir *William Wogan*, who had an intention by will to order his personal estate to be laid out in lands, for benefit of *Wm. Wogan* his nephew, and of *Lewis Wogan* and their male issues, and to continue it in his name.

And in consideration of covenant by *Lewis Wogan*, that he, his heirs, executors and administrators, would provide diet in his house in *Wiston* for Lady *Wogan* during her life, suitable to her quality, and two maid servants and two men servants, with coach and horses to attend her.

[708]

Now, although a court of equity does not usually decree the execution of a covenant or agreement made without any consideration; yet a slender consideration may suffice to carry the agreement into execution; as if made for provision for younger children, for affection to his nephew, and in order to make reconciliation between him and his father. Eq. Abr. 16.

Here the consideration of the agreement by dame *Mary Wogan*, is to accomplish what her husband intended to do by his will, but was prevented by death, and the covenant of *Lewis Wogan* to provide for her during her life; which are undoubtedly sufficient considerations to enforce the execution of the agreement 2 April 1710.

However it may well be doubted whether Lady *Wogan* understood she was to give up the inheritance that had been conveyed to her of lands in com' *Carmarthen*, for the deed 2 April recites, that Sir *William Wogan* died possessed of a considerable personal estate, consisting in leases, mortgages, judgments, statutes, bonds, &c. that she was minded to settle all her moiety, part of the said personal estate, then assigns all her moiety of the said mortgages, judgments, statutes, bonds, chattels real and personal of the said Sir *William Wogan*, &c.

Now

Now although the generality of the words, with the covenant she had done no act to lessen Sir *William Wogan's* personal estate, are sufficient in equity to oblige the transferring the lands in *Com' Carmarthen*, for the benefit of creditors and purchasers of Sir *William's* personal estate for valuable consideration, notwithstanding her having the inheritance of that estate conveyed to her; yet having the inheritance, she might possibly be unknowing that continued still a mortgage; it had, it is sure, been fairer to have been more explicit in this matter; it is sure Lady *Wogan* was a woman very easily imposed on; and it does not appear *Lewis Wogan* was less eager to make advantages of her weakness than *Meyrick*; for first, the assignment was of this personal estate immediately for the benefit of *Lewis Wogan*, which was not agreeable to the design of Sir *W. Wogan*, as recited in this deed, which was first to settle it on *W. Wogan* his nephew and his issues, but he is omitted and the deed directs the personal estate for the benefit of *Lewis Wogan*; the pretence for this is, that *W. Wogan* refused to settle his share of the personal estate to the same uses. But if it was Sir *W. Wogan's* intent to settle the whole first on his nephew, it was departing from that intent, to settle her part different from those uses he meant his estate should go in.

[709]

Secondly, The consideration of this deed on the part of *Lewis Wogan* was to maintain the lady during her life, in the manner mentioned in the articles. But it appears he took no care for that maintenance being secured to her, so that after his decease she dwelt with *Meyrick* two years and a half; so that although *Meyrick* was perhaps more imposing, *Lewis Wogan* was not so free from all imposition as was fit he should have been.

But in this case it is to be considered, whether the plaintiff is not barred by the statute of limitations, for *Lewis Wogan* died 1714. and *W. Wogan* his son was then about the age of fourteen or fifteen, and he died 20 Mar. 1728, so that he died six years after his full age; for he must be of age in 1720, and the bill was not filed till M. 1735. so that it should be allowed, that the statute of limitations does not extend to a trust, and *Meyrick* having notice of the articles 1710, was a trustee for *W. Wogan* the infant, as being a trustee by his enjoyment of this estate in *Com. Carmarthen*, that was purchased by, and consequently part of the personal estate of Sir *W. Wogan*, which by these articles *W. Wogan*

Wogan ought to enjoy ; yet by his death that trust was entirely determined, and consequently six years have elapsed since the last period of that time for which the present plaintiff demands an account.

[710]

Although the statute of limitation does not extend to a trust, Eq. Abr. 303, and admitting *Meyrick* is a trustee, and that the statute runs not upon him after the full age of *W. Wogan*, while the trust was continuing, which may be looked upon in nature of an account current, and if a man receive the profits of an infant's estate, and continues so to do several years after his full age, he shall be accountable for what he receives after as well as during his infancy. Eq. Abr. 7.

Yet when the trust is wholly determined, the statute must then run upon the plaintiff's demand, or where will it stop? if the suit may be brought after six, it may be after 26 years.

The statute 21 Jac. c. 16, saith, all actions of account and on the case (other than such accounts as concern the trade of merchandise between merchant and merchant, their factor or servant) shall be brought in six years, &c. yet if there be an account stated between merchants, the statute extends to it, as was resolved 2 Sand. 127. *Webber and Tivel*, 1 Lev. 287. and the reason given by JONES, who argued for the plaintiff, is, that the statute intended to except only accounts current and continuing between merchants, but when the account is settled and ascertained it becomes as a fixed debt.

So 1 Lev. 298. 1 Mod. 70. where the like plea was to an assumpsit on an account between merchants, the plaintiff discontinued; and so it was resolved *Chively and Bond*, 4 Mod. 105, and so agreed 2 Mod. 311.

Stat. limitations a bar in equity.

And the statute of limitations is as well a bar in equity as at law, *Sir George Sands ver. Blodwell*, Jon. 401. Bill in Chancery for an account between merchants was brought against an executor, and the statute of limitations pleaded and it was referred to three judges, JONES, CROOK and — for their opinion; indeed there the account was not finished, for *Freeman*, one merchant, owned 1200l. due and the other insisted on more, and the account not being settled or ended, the Judges thought the account not barred by the statute, but no doubt was but that the statute would have been a bar in equity as well as at law, if the account had been determined.

Sherman

Sherman and Withers, Mich. 21 Car. 2. 152. A bill was [711]
by an inland merchant against the defendant his factor, for
an account of 14 years standing, who pleaded the statute, 1 Caf. 12
which was allowed; for the Lord Keeper was of opinion, Chan.
the exception in the statute extended not to this case, but Temp.
only to merchants trading beyond sea. Char. 2
152.

So if one receives the profits of an infant's estate, and six
years pass after his full age, a bill in Chancery to account
shall be barred by the statute of limitations as much as an
action at common law; for this receipt of the profits of
an infant's estate is not such a trust as being a creature of a
court of equity the statute is no bar to; and since he might
have had his action of account at common law, there was
no necessity to come into equity. Trin. 1719, *Locky and*
Locky, Eq. Abr. 304. c. 10. Pr. Cha. 518.

But a difference was suggested, where a matter is of that
nature that a remedy lies at law as well as in equity; there
if the party pursues his remedy in equity, he shall be barred
by statute of limitations as well as if sued at law; but other-
wise it is, where the party has no remedy but in a court
of equity.

However it is to be considered, that though the statute
21 Jac. ca. 16. does not mention suits in equity, yet they
are construed to be in it; *per* Lord Chancellor MACCLES-
FIELD, Mich. 1721, statute of limitations speaks nothing
of bills in equity, yet these are construed to be within it.

In that case the statute was pleaded to a bill of revivor
after decree to account, and Lord MACCLESFIELD says,
if the suit had been on bill and answer, it could not have
been doubted but the plea had been good, for it was within
all the mischiefs designed to be prevented by the statute,
when vouchers lost and witnesses dead.

But, being after a decree to account, which is in nature [712]
of a judgment, he doubted, and ordered it to be spoke to
again; after defendant died, a bill of revivor against heir,
the same plea, *per* KING Chancellor, plea disallowed, for
bill of revivor is in nature of *scire facias* on judgment.

Statute of limitations after 20 years possession by mort-
gagee, bar to bill to redeem.

Vide case *Sherman and Withers*, *supra* Mich. 21 Car. 2.
Statute pleaded to bill by inland merchant against his factor
for account of 14 years standing, allowed.

Case 277 *Howarth Cook and John Cook ver. Sarah Cook, Widow, Hannah and Sarah her Daughters, infants. In Scacc.*

Whether a defendant after a decree against him shall, before execution, by alienation prevent the plaintiff from taking his lands upon the sequestration.

ON A BILL for a personal duty, a decree was against *Sarah Cook* the mother, who stood out in contempt, but before sequestration against her, she being tenant for life, remainder to — by feoffment, dated 28 Septemb. 1735, infeoffed trustees in consideration of 5s. and in consideration of 400l. part of a considerable sum recited to be due to her daughters; and thereby conveyed her estate for life to the said trustees, in trust for her daughters and their heirs.

Afterwards sequestration was taken out against the mother, and thereon this estate was seised by the sequestrators; but on application to the Court, by order 29 Jan. 1736, it was referred to the deputy to examine into the conveyance, and see what interest the defendants had in the estate; who reported, that *Price* and his wife (for he had married *Hannah* the eldest daughter) and *Sarah Cook* the other daughter, had not made out any sufficient title, whereby to impeach or affect the plaintiffs seisure of the said estate by virtue of the sequestration issued in this cause.

[713] To this report the plaintiff took exception in writing (as of late directed) first, That before the decree, the estate was settled for the jointure of the mother for her life; that the feoffment was made before the sequestration issued, and made *bonâ fide* for a valuable consideration.

It was insisted by Mr. WILBRAHAM, that the decree does not bind the land, nor is any lien upon it, but only binds the person of the defendant.

It must be agreed, that a decree in a court of equity being no court of record, does not in point of law bind the land, but the person only.

So it is said *per* Master of the Rolls, *Bligh & al^s versus Earl of Darnly* Trin. 1731, 2 W. (619) the defendant's father contracted before a master for the purchase of a third part of *Cobham-hall*, in *Kent*; and it was insisted by Attorney General, that the debt by this contract being due by a decree, it was in nature of a judgment, and would bind the real assets in the hand of the heir.

And this was said long ago by *Knightly*, 27 H. 8. 15. cited 1 Rol. Ab. 373, and it was agreed 1 Rol. Rep. 36. But

De Term. S. Mich. 13 Geo. 2.

But the question in this case is, Whether the defendant, after a decree against him, shall by alienation before execution sued prevent the plaintiff from taking these lands upon the sequestration?

It is agreed he cannot do so, if the alienation be voluntary without consideration; and so it was held, where after a decree to an account of a personal estate, and on exception to the master's report it was deferred, and in the mean time the defendant, on treaty of marriage for his son, but before it was concluded, conveyed his estate to his son to enable him to make a jointure, and to pay his debts 1700l. but with power of revocation, if his son died without issue. Hill. 32 & 33 Car. 2. Cha. Ca. 43. *Golston and Gardiner*.

[714]

So in the case of *Squib and Snelling*, 2 Ch. Ca. 48. it is said, a purchaser from J. S. who had a decree against him in Chancery for land, shall be bound by the decree, tho' he had never notice of it, tho' the decree binds the person, and not the land.

So where a decree was made by Commissioners of Charitable uses, and exceptions to it in Chancery, where the decree was after confirmed; but defendant in mean time had conveyed his land to raise portions for children, but with power of revocation, the land shall be sequestered for money decreed. Pasch. 34 Car. 2. *Harding and Edge*.

2 Cas. Cha.
Temp. Car.
2 94.
1 Eq. Caf.
Abr. 144,
c. 22.
1 Vern. 143.

So where defendant being decreed to pay a sum of money, or deliver up possession of a house and land in *Edmonton*, made an assignment of the house and land to a real creditor on bond, for satisfaction of his debt, of his own free will, without privity of the creditor, after the time set for paying the money or delivering possession, the Court decreed the possession of the house and land without regard to the conveyance. *Self and Maddox*, 1 Ver. 459. *Golston and Gardiner*, *supra*, was cited and allowed.

So where a decree was, devisee should enjoy against the heir, A. purchases in a mortgage, then purchases the equity of redemption of the heir, having notice of the will, tho' said to be destroyed, he shall be bound by the decree. 1690. *Finch and Howcham*, 2 Ver. 217.

D E

[715]

Termino Pasch.

13 Geo. 2.

Case 278 Owens *ver.* Sarah Smith, Executrix of Thomas Smith. In Scacc'.

Where demand is below the dignity of the Court, the bill shall be dismissed without entering into the merits.

BILL for discovery of assets, and it was suggested, that the plaintiff had applied to one *Matthews* to be his attorney, in an action of assault and battery by plaintiff against *Thomas Smith*, and upon a treaty of accommodation between them, it was agreed, that the plaintiff should pay *Smith* 50s. towards the expences, and *Smith* should pay the attorney's bill, who delivers a bill of 10l. 10s. 2d. but *Smith* dies before payment to him of 50s. or payment by him of the charges.

The defendant admits assets, and that she found such a bill among her husband's papers, but looked upon it as an unreasonable bill.

The plaintiffs bring on the cause to a hearing, not content with the discovery; and it was insisted by Mr. WILBRAHAM, for the plaintiff, that where the bill was for a discovery, the plaintiff might have relief for a debt or demand certain, or which might be made certain; that in this case the attorney's bill, though not tax'd, might be ascertained by the officer of this Court who frequently taxed bills for proceeding at law as well as in equity.

[716]

It was admitted, that if a bill in equity was necessary for a discovery, the plaintiff might have a decree for the demand in case it was certain, and admitted to be due, which was to avoid a multiplicity of suits.

But here the plaintiff had a plain remedy at law, and the demand was not ascertained nor admitted, for though a bill was delivered, that does not prove so much to be due, and the answer saith it is unreasonable; and altho' matters of law and equity are contained in a bill, the whole may be referred

De Term. Pasch. 13 Geo. 2.

ferred to an officer of the Court, yet that is not so proper where the whole is a transaction at law.

And here the plaintiff's demand is but 10l. 10s. 2d. which is a cause beneath the dignity of the Court ; so the bill was dismissed.

Hutchins *versus* Fitzwater Foy and Josias Gover. Case 279
In Scacc.

BILL for a legacy of 50l. charged on an estate devised in remainder to the defendant *Foy* and his heirs, to be paid to *Margaret*, wife of *Gover*, who took administration to his wife, and in satisfaction of money he owed the plaintiff, assigned it to him.

And the case was, That a man seised of lands in fee, by will dated 3 July 1732, devises all his real and personal estate to *Thomas Beal* for life, and after to his children, and for want of such issue, to his sister *Martha* for life, and after her decease, to *John Beal* for life, and then to his children, and for want of such issue, part of his real estate called *Monks* to *W.* and his heirs; the other part called *Marsh*, to the defendant *Fitzwater Foy* and his heirs, paying out of it, when it falls, 500l. viz. 100l. to *S. D.* 150l. to *W.* and *O.* 100l. to *N.* and 50l. a-piece to *Elizabeth*, *Mary*, and *Margaret*, the three daughters of his sisters.

The testator died 1732, *John Beal* died without issue, and his sister *Martha* died in his life-time, *Margaret*, one of the three daughters, married the defendant *Josias Gover*, and died in December 1734; *Thomas Beal* died without issue 1726, whereby the defendant *Foy* came to the possession of the estate devised to him and his heirs, and *Gover* having administration to his wife, assigned to the plaintiff the 50l. payable to the wife.

It was insisted by Mr. *BOOTLE* and Mr. *GUNDRY*, that *Margaret* died before the remainder fell into possession, and that the legacy or payment to her was lapsed, for it was to be paid out of the profits when it fell, and consequently could not vest in her till then.

That the antecedent estates to *Thomas* and *J. Beal* and their issues might have lasted many hundred years, and therefore it was uncertain, and a contingency whether it ever would happen.

Where an interest is actually vested in any one, it will go to their executors, or otherwise not.

[717]

Secondly,

De Term. Pasch. 13 Geo. 2.

Co. Lit.
203.

Secondly, That here was no devise of any money to *Margaret*, but only a condition annexed to the estate of the defendant, *paying* in a will making a condition, for breach of which the heir might enter, but a stranger cannot take advantage of it.

Thirdly, that here the charge does not begin till the estate falls in possession, and then *Margaret* being dead could take nothing, the time is not annexed to the payment but to the devise, for nothing was devised before.

Fourthly, the devise is too remote, after a dying without issue, which may never happen.

Rep. Eq. 11.
Prec. Cha.
267.
2 Eq. Abr.
540, c. 5.

The case of *Carter and Bletso*, 2 Vern. 617. may be compared to this; *Matt. Bletso* devised all his messuages &c. to his eldest son and his heirs, but it is my will my son shall pay out of the said lands 600l; to my daughter *Mary* 200l. at her age of 21; to my son *J.* 200l. at 21; to son *Matt.* 200l. at his age of 21, and 4l. *per ann.* for maintenance till 21, and the portions paid.

[718]

Mary married, and died before 21, her husband took administration; but *per cur.* there is no vesting clause in the will, the direction that his son pay *Mary* at the age of 21 vests nothing till she attain her age of 21; and she dying before, it never arises.

Post. 724.

So in the case of *Venn and Clark*, in Chancery 24 July 1732, upon the will of Lady *Mary Green*, dated 11 Decr 1729, whereby she devised the sum of 2000l. *inter al'* out of her real and personal estate unto *Thomas Lewis*, on trust to put out to interest, till *Mary Lewis*, grandchild of her sister *Beecher*, attain the age of 18, or marry, and when she attains that age, or marries, to pay it her.

She died before her age of 18 or marriage; and the court held she was not intitled to this legacy, but dismissed the bill brought by her administrator for that purpose, without costs.

1 Atk. 482.
2 Eq. Caf.
Abr. 464.

So in the case of *Prouse and Abington*, in Chancery, 26 April 1728, *Thomas Compton* by will 13 Aug. 1718, devised part of his real estate to trustees and their heirs, on trust to pay the sum of 500l. unto his godson *Thomas Prouse*, to be paid to him at his age of 21 years or marriage; he died under age and unmarried; and it was held the money should not be raised, but sunk for the benefit of the heir.

1 Atk. 502.
2 Eq. Caf.
abr. 550. c.
30.

In the case of *Hall and Terry*, heard by Lord HARDWICK 8 Nov. 1738.

Nicholas Terry devised lands to *Stephen Terry*, and his heirs, so as he, his heirs or assigns do in 12 months after the

De Term. Pasch. 13 Geo. 2.

estate shall come unto him (which was on his wife's decease) pay unto his grandchild after named *Elizabeth Oades*, the sum of 250l. The testator died in — 1714, *Elizabeth* died within 12 months after the wife; and it was held by the Court, that nothing became due to the executor, for there was nothing devised till the 12 months expired, for the devise and time of payment commenced together, and the will could not have a double effect to give and vest an interest, and then give direction as to the payment.

[719]

But on the other side it was answered, and resolved by the Court, that in this case the plaintiff was well intitled to the legacy of 50l. assigned to him by the husband and administrators of *Margaret*.

It is indeed now a settled rule in courts of equity, that 1 Will. 224. where a devise or settlement of lands is made by will or deed, charged with portions for younger children, payable at age or marriage, the portion shall sink in the estate for the benefit of the heir or devisee, in case the child die before the portion becomes payable; it was so held *Pawlet* and *Pawlet*, affirmed in the House of Lords. 1 Ver. 204, 321. 2 Ver. 366. 1 Eq. Abr. 267. c. 1.

2 Vent. 366.
2 Freem. 93.
2 Cha. rep. 286.

There was formerly a difference taken and insisted on, between lands devised and lands settled by deed; but it is now clearly settled the case is the same in both, for the reason is the same; for in both cases it appears, that it was the intention of him that made the will or settlement, that monies appointed to be raised, should be a provision for the settling these children in the world, but if they died before there was occasion for such provision, there is no need to raise the portions.

Cases to this effect are numerous, *Smith and Smith*, 2 Ver. 92, 178, 416, 396. So in the case *Bruen and Bruen*, 2 Ver. 432. Pre. Cha. 195. *Tournay and Tournay*, Pre. Cha. 290. *Warr and Warr*, Hill. 1702. *Freeman and Freeman*, Mich. 1727. Eq. Abr. 267, 268. *Norfolk*, and *Gifford*, 2 Ver. 282. Prec. in Chan. 213.

1 Eq. cas. abr. 267.
c. 5, 268,
c. 4
1 Eq. Cas. abr. 267. c. 2.
2 Freem. 254.
2 Eq. cas. ab. 654.
c. 6.
Rep. in Eq. 11.
Prec. Cha. 267.

The cases cited by Mr. Gundry, went on the same foundation, *Carter and Bletso*, 2 Ver. 617. the devise was to his eldest son, and wills he should pay 200l. to his daughter *Mary* at 21, or marriage, which was plainly intended as a provision for her at full age or marriage, and therefore if she died before, there was no occasion for it.

What was said by the Court, that there was a vesting clause, was a reason *ex abundanti*, for properly speaking, the

De Term. Pasch. 13 Geo. 2.

the portion is not intended to vest in the intent of the testator till it becomes payable.

The cases *Venn* and *Clerk*, *Price* and *Abington*, went on the same reason.

Ante 718.

2 Freem.
254.

The case of *Hall* and *Perry*, seems to be parallel to that of *Bruen* and *Bruen*, 2 Ver. 439. where the father having by marriage settlement created a term to raise 3000l. for his daughters portions, having but one daughter, devises his lands to trustees, on trust to make good his wife's portion, and raise the 3000l. in 12 months after death of him and his wife; the daughter dies within the year, as appears, 1 Eq. Abr. 267. (though not taken notice of by Mr. *Vernon*) and so the portion was not raised. So in the case of *Hall* and *Terry*, the grand-daughter dying before the year, the time appointed for raising it, was not payable.

But even in wills or settlements, if the money devised or directed to be raised be actually vested, and the interest fixed in the party, it is to be raised though the party die before the time limited for the payment.

Therefore Mr. *Bootle* made the right distinction, whether this 50l. to *Margaret* was charged or vested in her, or not? For if it be a present charge by the will, and the interest vested in her, it must belong to her administrator, and consequently to the plaintiff in equity.

1 Eq. cas.
abr. 268,
c. 7.

1 Eq. abr.
201, c. 16.

[721]

Earl of Rivers and *Earl of Darby*, 2 Ver. 72. Land was limited to A. for life, then to his wife for life; remainder to his first and other sons in tail male; remainder to trustees in fee; provided if no issue male, to raise out of profits 10,000l. for his daughter, who by will at 17 disposes it to her mother. Decreed to devisee, because it was an interest vested in the daughter, though she died under age.

So where land was devised to A. for life, remainder to B. in fee, he paying 400l. whereof 200l. to be at disposal of wife by will as she should think fit; this being an absolute disposition to the wife, though she made no will, should go to her administrator. 2 Vern. 181. *Robinson* and *Dufgale*.

But this is a stronger case, for here the defendant takes the remainder charged with these payments; the same will that vests the remainder in him, vests it subject to this charge, and if he takes, he must take it *cum onere*.

It is objected, the charge does not commence till the remainder comes in possession, for the payment is to be out of the rents. It is true, the money cannot be demanded till the defendant can pay it out of the profits; but it is a present

present estate in *Foy*, and consequently a present interest in *Margaret*; though *salvend' in futuro*. It cannot be doubted but *Foy* might by will devise his remainder, but by statute of wills no devise can be made but by a person having the estate; and if he devised it, it would have been subject to this charge.

So *Margaret* in her life might have released this interest, but none can release what he has no present right to. He may release an interest though it be future or merely possible, but cannot release where he has no present right or interest.

And the court was of opinion *Foy* was compellable in equity to pay this 50l. to the plaintiff; and I delivered the opinion of the Court to the effect following:

If a man by settlement charges his lands with the payment of portions of daughters or younger children, to be paid at the age of twenty-one or marriage, and the daughters or child die before the time limited for payment, the portion shall not go to the administrator of the daughter, but sink in the inheritance for the benefit of the heir. *Ante 719.* *Pawlett* and *Pawlett*, affirmed in the House of Lords. 2 Vent. 366. 1 Vern. 204, 374. [722]

And there is no difference between lands devised for payment of portions, and where by settlement. 2 Vern. 92. *Smith* and *Smith*. 2 Vern. 178, 416. *Ante 719.*

Another difference settled in equity is between a legacy, or sum of money vested before the death of the legatee, and where it is not vested; if the legatory dies before the legacy vested, it shall not go to the executor or administrator; but if it be vested before his death it shall.

And this not only in pecuniary legacies, as where 100l. is given to an infant at his age of twenty-one, and where given to be paid at the age of twenty-one: in the first case, if he die before that age, it shall go to the administrator, in the other not. *Dav. 59. Vide in margin. Resolved. 2 Salk. 415.* Vent. 342, 366. Ch. Rep. 112. 2 Vern. 195.

And if devised to be paid with interest, that imports it should vest presently. *Skin. 147, 2 Vern. 137, 508, 673.*

And it is the same where money is directed to be paid out of land, as in the case of *Earl of Derby* and *Earl Rivers*, 2 Vern. 72. cited by Mr. ORD. By a marriage settlement lands are limited to husband for life, to wife for life, then to first and other sons, &c. provided if no issue male, and one or more daughters, trustees shall stand seised to the

De Term. Pasch. 13 Geo. 2.

intent the daughter receive out of the profits 1000l. and 100l. for maintaing, without limiting time of payment; the daughter at seventeen disposes of it by will; and held it was a vested interest in the daughter, and well disposed. Trin. 1688.

[723]
Ante 719

But 2 Vern. *Bruen* and *Bruen*, by marriage settlement a term is created to raise 3000l. for daughters portions twelve months after the death of husband and wife; the daughter dies at the age of five years, the portion shall not be raised; for the reason given in Vern. 72. is, that being to be raised out of land, she could not have occasion for it; but the better reason is, that she dying within twelve months, the time wherein it was to be raised, it was not vested. Pasch. 1702. Eq. Abr. 367.

The distinction therefore was well taken, whether the 50l. was vested, or not vested in *Margaret*.

And we think it vested;

For first, The remainder vested immediately by death of the testator; for *Foy* might sell or devise it, and consequently the 500l. is vested in those to whom it was payable; for if he had sold it, it must be subject to the charge laid upon it by the testator.

Secondly, The estate and the charge upon it pass together, and the devisee, must take it *cum onere*; for as it was the testator's intent *Foy* should have the estate, it was as much his intent he should pay the money out of it when he had it.

It was said to be a condition, (*paying making a condition in the will*) but that strongly shews the testator's intent was, that *Foy* should not have it unless he paid the money.

The cases cited fall under distinctions before mentioned.

The case of *Carter* and *Bletso*, 2 Vern. 617, was, devise to his son and his heirs, but his will was, his son should pay 200l. to his daughter at her age of twenty-one, she died before, and consequently not payable, by both rules laid down; it was not given till twenty-one, and portion payable out of land shall not be raised, if the party to whom payable die before the time limited for the payment of it.

De Term. Pasch. 13 Geo. 2.

In the case of *Van and Clark*, the devise was to trustees [724] to put out at interest till the grand-daughter of her sister attained the age of eighteen, or married, and then to pay it to her; so that nothing could vest in the grand-daughter till that contingency happened, and she dying before, the portion could not possibly vest.

Cited in argument
Venn & Clerk.
Ante 718.
1 Atk. 510.

In the case of *Prouse and Addison* likewise the trust was to pay at the age of twenty-one, or marriage, and consequently the legatee dying before that age, or marriage, the trustees were not required to pay the money.

Prowse & Abington.
1 Atk. 482.
2 Eq. cal.
abr. 464.

The case of *Hall and Terry* went upon the same reason; the trustees were not required to pay till twelve months after the estate came to them, which was after the mother's death, and consequently the legatee dying before, the trustees could not pay; and the expression, that the devise and time of payment commenced together, imports that the devise had no effect, and could not vest an interest till the time of payment came upon which the trustee was to pay.

Ante 718.
1 Atk. 502.
2 Eq. abr.
550, c. 30.

There was a case of the like nature *inter Gordon and Raines*, 4 Geo. 2. Rep. of Chan. Ca. 41. where a term of years was vested in trustees, on trust that if no son of the marriage, and there be one or more daughters, who shall attain the age of sixteen, the trustees, after the death of *H. Raines* and his wife, shall raise 6000l. to be paid at the age of sixteen; in case *H. Raines* and his wife be then dead; there was a daughter who lived to the age of twenty-two, but died in the life of her father and mother *H. Raines* and his wife. It was held by the Lord Chancellor KING, assisted by Lord RAYMOND and JEKYL, that the husband and administrator of this daughter was not intitled to the 6000l. which was not payable but upon a contingency which never happened; for all the cases, when the portion or money to be paid were looked upon to be vested, are where the money was not payable upon a contingency, or the contingency had happened.

2 Kely. 41.
3 P. Will.
134.

[725]

But in the present case, neither the remainder was limited upon a contingency, nor the legacy of 50l. payable to *Margaret* upon any contingency, but the remainder vested immediately upon the death of the testator, and consequently the 50l. payable out of the profits of that estate as soon as it came in possession.

Brotherow,

Case 280 Brotherow, Widow of J. Brotherow, *versus* Hood.
In Scacc'.

Husband
dying before
legacy was
payable to
his wife, it
is in the na-
ture of a
Chose in
Action,
which will
survive to
the wife.
2 Eq. Abr.
144, c. 17.

BILL for a legacy of 60l. devised to her by will of *Jos. Mills*, 1715, when she would attain the age of twenty one; she attained that age 14 Feb. 1734, but before had married one *Brotherow*, who was dead, and the bill was against the defendant as executor of the testator, who denied assets.

But it was objected, the executor or administrator of the husband ought to have been a party, for the right vested in the husband, who might release it.

Sed non allocatur; for the husband dying before the legacy was payable, it was in the nature of a *Chose in Action*, which would survive to the wife; and although the husband might possibly have released it, yet that shall not be presumed; and if it had been so, the defendant, to whom the release must be given, might make it appear.

Henry Harvey and Catherine ux', Daughter of Sir Thomas Aston, and Anne Clifton, Widow, another daughter, *versus* Dame Catherine his Relict, and Sir Thomas Aston his Son and Heir, Henry Wright and Andrew Kenrick, In Canc'.

[726]
Case 281

ON AN APPEAL from a decree of his Honour the Master of the Rolls, the case was this:

Sir Thomas Aston having issue a son and three daughters, by lease and release 27 & 28 May 1712, Sir Thomas Aston, makes a voluntary settlement to the use of himself for life, then as to part to his wife for life, and after to his first and other sons in tail male; then to the use of Sir Robert Burdet and Serjeant Cheshire, for 1000 years; which term is afterwards made to commence immediately on the decease of Sir Thomas Aston, and was, *inter al*,

On trust, that if Sir Thomas should have one or more sons living at his death, and also more than one daughter then living, or born after, or married in his life with his consent, the trustees should raise for portion of every such daughter 2000l. and should pay to her such sum at the time of her marriage with such consent as aforesaid, *i. e.* with consent of her mother, if living and not remarried; if dead, or married to a second husband, with consent of the trustees Sir Robert Burdet and Serjeant Cheshire, or the survivor of them, his executors, administrators or assigns.

And also on trust to raise for the maintenance of such daughters yearly the sum of 50l. till their age of eighteen, and after 70l. *per annum* till their marriage with such consent during the life of the mother, but if she died or married again, 100l. *per annum* till their marriage or death.

Provided, that if the said portions and maintenances should be raised or secured by those in remainder, or if there should be no daughters or younger sons, or if all the daughters die before marriage, and the younger sons before

A condition precedent, viz (Marriage with consent of mother or others) annexed to a portion or legacy, not to be dispensed with in a court of equity, tho' in the case of daughters fortunes.
2 Eq. abr. 147, c. 6, 216, c. 12, 432, c. 15, 503, c. 41, 539, in note 650, c. 33. Talb. 212. 1 Atk. 361.

[727]

De Term. Pasch. 13 Geo. 2.

before age of twenty-four, and the expences of trustees be satisfied, the term should cease.

By will 26 Feb. 1722, Sir *Thomas Aston* taking notice of the said term and trusts, and the purchase of other lands, devises those estates to the defendant *H. Wright* and *Andrew Kenrick* for 500 years, on trust by mortgage or sale to raise the sums of 3100l. and 1000l. (monies he had applied out of his personal estate towards such purchase) and pay them to his executors, which should be accounted as part of his personal estate; then wills, that out of the monies to be raised by such mortgage, and out of the monies due to him on mortgages, bonds, notes or other securities, or in hands of goldsmiths, bailiffs, agents, or due for rent, there should be paid to each of his daughters unmarried and unprovided for at his decease 2000l. as an augmentation of their fortunes provided for them by the said indentures, to be paid at such times, and subject to such conditions, provisoes, limitations and agreements, as their original portions are in the said indenture made subject and liable to.

By codicil he directs the term of 1000 years limited to Sir *Robert Burdett*, and Serjeant *Cheshire*, to commence immediately on his own decease, and adds other estates to the said term for the better raising his daughters portions, as therein appointed to be raised and paid; and limits his estate in *Cheshire* to Serjeant *Cheshire*, till his sons attained the age of 25 years, on trust to raise provisions for his sons, and to apply the residue of the profits towards raising his daughters portions by the said indenture, as they are by the said indenture appointed to be raised and paid.

[728] 16 Jan. 1724 Sir *Thomas A.* died leaving a son and three daughters; Pasch. 1725 the daughters exhibit a bill, praying the will might be proved, the trust executed, and directions for execution of trust.

6 Dec. 1725, Master of the Rolls decreed that the settlement, will and codicil were duly proved; that the trustees should raise the maintenance, and when portions became due should apply for further directions.

Plaintiff married *Catherine*, and *Clifton* married *Anne*, now his widow, both without mother's consent, and in Trin. 1734, exhibit a bill of revivor for payment of the portions, which by order 7 Nov. 1734 stood revived.

De Term. Pasch. 13 Geo. 2.

And dame *Catherine A.* in her answer to it insists, that *Mr. Harvey* and his wife were acquainted before marriage with the terms on which the provision for daughters was made, and that if they married without consent they could not have his wife's portion.

That the marriage was against her consent, and she refused consent, because *Harvey* had no estate real or personal, to make a suitable settlement for wife or children, nor was any proposed, so that she could not in justice or conscience consent.

5 Nov. 1739, it was decreed, that the plaintiffs were intitled to their original portions as well as to the additional portions given by the will, and interest for the same from the time of their marriage.

On this case, the portions provided by the settlement and by the will have properly been considered distinctly, and I shall likewise consider them distinctly.

First question is, Whether, when a father by a voluntary settlement of his real estate vests a term of years in trustees on trust to raise 2000l. a-piece for his daughters portions, to be paid at the time of their marriage with their mother's consent, and a yearly maintenance till marriage with such consent, it is proper for a court of equity to compel the trustees to pay such portion on the daughter's marriage, though her marriage was without the consent required?

[729]

Secondly, Whether if the portion by the settlement ought not to be paid, there will not be a difference in respect to the augmentation of the portion given by the will?

In the consideration of these questions it may not be amiss to lay out of the case what seems uncontroverted on both sides.

And first, That if a portion be given on the consideration that the daughter should never marry, I think such a condition should be rejected as repugnant to the original institution of the creation of mankind: In the case of *Fry and Porter*, Ch. Baron *HALE* takes notice that the condition did not restrain marriage, though it required consent.

Secondly, If a pecuniary legacy be given on consideration that the legatee shall not marry without consent, and no devise over; the condition would be held ineffectual in this Court.

So it was held in the case of *Sir H. Bellasis, ver. W. Ermine*, 1 Cha. Ca. 22.

Rep. cas.
Cha. temp.
Car. 1, 26.
1 Vent. 199.
Raym. 236.
2 Lev. 21.
1 Mod. 86.
2 Keb. 756,
787, 814,
867.
3 Keb. 19.
1 Eq. abr.
111, c. 4.
1 Mod. 306,
2 Ch. rep. 26.
2 Eq. cas. ab.
110, c. 1.
2 Freem.
171.
2 Eq. ab.
So 110, c. 3.

De Term. Pasch. 13 Geo. 2.

1 Eq. Abr.
110, c. 3.

So *Flemyne* and *Waldgrave*, 1 Cha. Ca. 58.

So in the case of *Jerveis* and *Duke*, 1 Ver. 19.

So *Garrett* and *Pretty*, 2 Ver. 293, and in many other cases; so that it seems a point established in this Court.

[730]

1 Vent 199.
Ray. 236.

2 Lev. 11.

1 Mod. 86.

2 Keb. 756.

787, 814.

867.

3 Keb. 19.

1 Eq. Abr.

111, c. 4.

1 Cas. Chan.

138.

2 Cha. Rep.

26.

And the true reason of those cases seems to be what it intimated by Ch. Baron HALE in the case of *Fry* and *Porter*, 1 Mod. 328. to keep an uniformity between this Court and the ecclesiastical Court; for since pecuniary legacies may be sued for in the ecclesiastical Court where such condition would be held void, it would be strange the legatee suing in the ecclesiastical Court should recover his legacy, but suing here should be barred.

And it is probable the like determination might be made in this Court, to keep up an uniformity in its own decrees, if a legacy should be given out of land in the same manner, tho' the ecclesiastical Court could have no cognizance in that case, but it might appear incongruous the same words should have a different construction in respect to a legacy out of lands, from what they would have in case of a money legacy, when there is no essential difference in the equity or reason of the thing.

But on the contrary it is as fully established in this Court, that where a pecuniary legacy is given to a single woman, on condition that she do not marry without consent, and if she do so, that then the money shall go to another person, if she marry without consent required, she shall lose her legacy.

In the case of *Wiseman* and *Forster*, 2 Cha. Rep. 23.

In the case of *Sutton* and *Jewks*, 2 Cha. Rep. 95. *Jerveis* and *Duke*. 1 Ver. 19.

In the case of *Strutton* and *Grimes*, 2 Vern. 333, and many other cases, which it is needless to enumerate, since it is agreed, and no case to the contrary.

But the ecclesiastical Court makes no difference where there is a devise over, and where not; yet courts of equity have always made a difference; which shews, that where the intent of the party is clear and exprefs, that the legatee shall not have the legacy unless she marry with consent, the court of equity hath not followed the rule of the ecclesiastical court.

[731]

And as this Court allows the condition of not marrying without consent, where the intention of the donor or deviser is apparent it should be complied with, by devising it over if it was not; so it is more strongly allowed where the

the settlement is of lands on such condition; as appears by Ante 730. the case of *Fry and Porter*.

And much more so where such condition is made a condition precedent; as was determined in the case of *Bertie and Lord Falkland*.

These things being premised, and I think agreed on all hands, I shall consider how far the present case agrees or disagrees with the rules and grounds upon which the determinations in the points mentioned have been made.

Now in the present case it seems plain, that the marriage with consent is made a condition precedent to the payment of the portions provided by Sir *Thomas A.* for his daughters by the settlement 1712, for the 2000l. is to be paid to each daughter at the time of marriage with such consent as aforesaid, so that such marriage must necessarily precede the payment of the money.

It is admitted by the counsel for plaintiffs, that the marriage must precede, and that is the principal thing regarded, and the consent is only a circumstance that may well be dispensed with.

But upon consideration of the whole settlement, it seems evident to me, that the marriage with consent, was the principal thing in view of Sir *Thomas A.* for it is repeated in every branch of the trust, if there was no son, and two daughters, the portion of youngest was to be paid on marriage with consent; so if more than two daughters; so if sons and two or more daughters; so that the consent required was as much designed by Sir *Thomas A.* as their marriage, to intitle the daughters to their portions.

It is a known rule, where a condition precedent copulative precedes an estate or trust, the whole must be performed before the estate or trust can arise; the case of Sir *Cesar Wood*, alias *Creamer* ver. *Duke of Southampton*, Ca. P. 83. is an authority expresses in this point; Sir *H. Wood*, on marriage of his daughter with the duke, made a settlement on trust to raise maintenance till marriage or age of 17; and if his daughter after her age of 16 should marry and have issue male by the duke, then for settlement on the issue male, and for a better provision for the duke and his wife, on trust for the duke and his wife for their lives, and after to their first and other sons in tail male. She married before the age of 16, and after that age died without issue; the question was, Whether the duke should not have the estate for his life? And at first decreed for him, but that decree

1 Eq. cas.
ab. 110, c.
40.
1 Salk 231.
3 Cha. Cas.
129.
2 V. ra.
333.
12 Mod.
182.
Holt 230.
2 Freem.
220.

[732]

Show. Par.
Ca. 83.

De Term. Pasch. 13 Geo. 2.

1 Eq. Abr.
110, c. 3.

So *Fleming* and *Waldgrave*, 1 Cha. Ca. 58.

So in the case of *Jerveis* and *Duke*, 1 Ver. 19.

So *Garrett* and *Pretty*, 2 Ver. 293, and in many other cases; so that it seems a point established in this Court.

[730]

1 Vent 199.

Ray. 236.

2 Lev. 11.

1 Med. 26.

2 Keb. 756.

787, 814.

867.

3 Keb. 19.

1 Eq. Abr.

111, c. 4.

1 Cas. Chan.

138.

2 Cha. Rep.

26.

And the true reason of those cases seems to be what it intimated by Ch. Baron HALE in the case of *Fry* and *Porter*, 1 Mod. 328. to keep an uniformity between this Court and the ecclesiastical Court; for since pecuniary legacies may be sued for in the ecclesiastical Court where such condition would be held void, it would be strange the legatee suing in the ecclesiastical Court should recover his legacy, but suing here should be barred.

And it is probable the like determination might be made in this Court, to keep up an uniformity in its own decrees, if a legacy should be given out of land in the same manner, tho' the ecclesiastical Court could have no cognizance in that case, but it might appear incongruous the same words should have a different construction in respect to a legacy out of lands, from what they would have in case of a money legacy, when there is no essential difference in the equity or reason of the thing.

But on the contrary it is as fully established in this Court, that where a pecuniary legacy is given to a single woman, on condition that she do not marry without consent, and if she do so, that then the money shall go to another person, if she marry without consent required, she shall lose her legacy.

In the case of *Wiseman* and *Forster*, 2 Cha. Rep. 23.

In the case of *Sutton* and *Jewks*, 2 Cha. Rep. 95. *Jerveis* and *Duke*. 1 Ver. 19.

In the case of *Strutton* and *Grimes*, 2 Vern. 333, and many other cases, which it is needless to enumerate, since it is agreed, and no case to the contrary.

But the ecclesiastical Court makes no difference where there is a devise over, and where not; yet courts of equity have always made a difference; which shews, that where the intent of the party is clear and express, that the legatee shall not have the legacy unless she marry with consent, the court of equity hath not followed the rule of the ecclesiastical court.

[731]

And as this Court allows the condition of not marrying without consent, where the intention of the donor or deviser is apparent it should be complied with, by devising it over if it was not; so it is more strongly allowed where the

De Term. Pasch. 13 Geo. 2.

the settlement is of lands on such condition; as appears by Ante 730.
the case of *Fry and Porter*.

And much more so where such condition is made a condition precedent; as was determined in the case of *Bertie* and *Lord Falkland*.

These things being premised, and I think agreed on all hands, I shall consider how far the present case agrees or disagrees with the rules and grounds upon which the determinations in the points mentioned have been made.

Now in the present case it seems plain, that the marriage with consent is made a condition precedent to the payment of the portions provided by Sir *Thomas A.* for his daughters by the settlement 1712, for the 2000l. is to be paid to each daughter at the time of marriage with such consent as aforesaid, so that such marriage must necessarily precede the payment of the money.

It is admitted by the counsel for plaintiffs, that the marriage must precede, and that is the principal thing regarded, and the consent is only a circumstance that may well be dispensed with.

But upon consideration of the whole settlement, it seems evident to me, that the marriage with consent, was the principal thing in view of Sir *Thomas A.* for it is repeated in every branch of the trust, if there was no son, and two daughters, the portion of youngest was to be paid on marriage with consent; so if more than two daughters; so if sons and two or more daughters; so that the consent required was as much designed by Sir *Thomas A.* as their marriage, to intitle the daughters to their portions.

It is a known rule, where a condition precedent copulative precedes an estate or trust, the whole must be performed before the estate or trust can arise; the case of Sir *Caesar Wood*, alias *Creamer ver. Duke of Southampton*, Ca. P. 83. is an authority expresse in this point; Sir *H. Wood*, on marriage of his daughter with the duke, made a settlement on trust to raise maintenance till marriage or age of 17; and if his daughter after her age of 16 should marry and have issue male by the duke, then for settlement on the issue male, and for a better provision for the duke and his wife, on trust for the duke and his wife for their lives, and after to their first and other sons in tail male. She married before the age of 16, and after that age died without issue; the question was, Whether the duke should not have the estate for his life? And at first decreed for him, but that decree

1 Eq. cas.
ab. 110, c.
40.
1 Salk 231.
3 Cha. Cas.
129.
2 V. r. d.
333.
12 Mod.
182.
Holt 230.
2 Freeman.
220.

[732]

Show. Par.
Ca. 83.

decree was reversed in the House of Lords; for it was said the words were plain and certain, that there must not only be a marriage, but issue male; and when a condition copulative, consisting of several branches, is made precedent to any use or trust, the intire condition must be performed else the use or trust can never arise, or take place; and it would be violence to break the condition into two parts which is but one according to the plain and natural sense of it.

2 Vern.

311.

Mod. 222.

The same determination was made afterwards in the Court *inter* Sir *Cæsar Wood* and *W. Webb*, Pa. Ca. 87 and affirmed in the House of Lords.

So that, according to the plain rules of construction, the marriage with consent, which is one intire condition, must be complied with in the whole, before the portion of the daughter can be payable, if the intent of Sir *Thomas A.* can take place.

[733]

This is still more evident, if possible, in that Sir *Thomas A.* hath directed maintenance for his daughters till such marriage with consent; now it could never be Sir *Thomas A.*'s meaning, that the maintenance should continue after the portions paid; but if the portions be payable on marriage though without consent, and the maintenance be paid till marriage with consent, they must have the maintenance and interest of portion at the same time; this plainly shew Sir *Thomas* intended the portions should not be paid till the maintenance ceased, that is, till marriage with consent required.

It was observed very truly, that in the proviso that determines the trust, the words were *If no daughter, or all die before marriage, &c.* the term should cease; but that must be intended of such marriage as before mentioned, the marriage with consent of mother or trustees.

It was likewise observed, that the trust is, if Sir *Thomas* should have two daughters living at his death, or who should marry in his life-time with his consent, the trustees should raise 2000l. for the portion of every such daughter; whence it was inferred, that if the portions were to be paid only on marriage with consent of mother or trustees, such daughter as married in Sir *Thomas A.*'s life with his consent, could have no portion; but I see no ground for such inference, for since 2000l. was to be raised for the portion of every such daughter who was living at his death, or married in his life with his consent, and consequently

quently the time of payment on marriage with consent of mother and trustees, must extend only to such daughter as married not with father's consent in his life.

I am therefore of opinion, that marriage with consent of mother or trustees, is a condition precedent, that must be performed before the daughter can be perfectly intitled to the 2000l. to be raised by the trust of this settlement.

And that it was the plain and manifest intention of Sir Thomas A. that his daughters should not have the portions, to be raised by this trust, paid at their marriage, unless they married with such consent as he prescribes to them.

But the principal objection is, that if the intention of Sir Thomas A. was such, yet that intention is not agreeable to the rules of this Court; for by the civil law a condition not to marry without consent of others, is unlawful and void, and that rule of the civil law is adopted into the determinations of this Court in like cases; and the civil law makes no distinction between conditions precedent and subsequent, but looks on both as equally unlawful.

The knowledge of the civil law is in many respects useful, but in regard to the determinations of this or other courts in *Westminster Hall*, SELDON seems to make a proper observation, Dissert. ad Flet. l. 3. sec. 5, who after notice taken of the prevalence of the civil law in this realm in several periods of time, concludes that it is manifest some sort of use of it prevailed in decisions that were to be determined by the law of *England*; not that any thought the realm subject to the imperial law, or that the common law could receive any change from it, for all taught the common law was to be followed, where it varied from it, or was repugnant to it; but if no express rule of the common law in the case, the rule of the civil law was followed; or if both laws agreed, the matter was in some measure confirmed or explained by the words in the civil law.

Observation
on the civil
law.

It is plain from what has been before observed, in regard to condition of not marrying without consent, when annexed to legacy pecuniary without any devise over, the rule of the civil law is followed; if there be a devise over, the rule of the civil law is rejected.

The

The present case being different from both these extremes, in order to discern how far the reason of the civil law is applicable to it, it may be proper to consider shortly the ground upon which this rule in the civil law was founded.

[735]

Now as by statute of wills 32 H. 5. a man was allowed to devise his lands, so as he left a third part of his land held by knight-service to descend to his heir.

So by *Lex fascidia legare, jus esto dum non minus quam quartam partem eo testamento hæredes capiant.* Dig. l. 39. tit. 2.

And if less was left, it was to be made up a fourth part — tit. 18. Hence it was said he could devise only *usque ad quadrantem*, for as he that had the whole inheritance, was called *hæres, ex asse*, as that was divided into twelve parts the legataries could have but nine parts, and the other three remained to the heir; and if the heir was totally disinherited without just cause, the will was set aside, as *testamentum inofficiosum.* Just. l. 2. tit. 13.

This fourth part of the heir was called *legitima portio*.

This *legitima portio* being payable on marriage, when they went into another family, was endeavoured to be avoided two ways.

First, by giving it on condition that they should not marry.

Secondly, By preventing their marriage.

Both were endeavoured to be remedied by the *lex Julia* which provided, as Dr. Strahan rightly observed, *qui cæcatus aut viduitatis conditionem hæredi legatariove injunxerit hæres legatariusve ea conditione liberi sunt, neq. minus delatam hæreditatem legitimam hac lege consequantur.* Goth' d. fonte Juris Civilis.

Against the hindrance of the child's marriage, it was provided, *qui liberos, quos in potestate habent, injurie prohibuerint ducere uxores aut nubere*, and by a subsequent law, *quod dotem dare non volunt, per proconsules, præfidesq. provinciarum cogentur in matrimonio collocare & dotare.* Dig. l. 23. tit. 1.

[736]

The branch of the *lex Julia*, which made void conditions prohibitory of marriage annexed to a legacy, mentions only such as prohibited marriage totally, and extended to prohibitions to widows as well as maidens; but in respect to widows it was soon after dispensed with; and therefore if a man gave a legacy to his wife on condition, if she married it should go to another, *non dubium est quin, si nupsset, co-*

De Term. Pasch. 13 Geo. 2.

cogenda est restitutio, saith GAINS. Dig. l. 32. tit. 3.

And though such a condition is mentioned as void, *Si mulieri legatur*. Dig. l. 35. tit. 1. l. 22.

Yet Gothofred in his notes in the margin asks *qui si uxori?* Answer, *si nupserit, cogenda est*;

And saith the law was abrogated in respect of legacies to a wife, Nov. 22. c. 44. for she must chuse to forbear marriage, if she would have the legacy, or to lose the legacy, if she would marry.

So Orph. Leg. 3 pt. c. 17, s. 9, saith, such condition annexed to a legacy given to a virgin is void; but the civil or rather canon law, allows it in a legacy to a widow, especially if given by the husband to his wife, or son to his mother.

Another evasion of this law, was by annexing a condition not wholly prohibiting marriage, but requiring to marry *ad arbitrium* or with consent of another, whose consent he knew would not be given.

But this being evasion, was looked upon as equally unlawful, *rescendi debet, quod fraudendæ legis gratia adscriptum est*. Dig. l. 35. tit. 1. l. 64.

But this was void only *ubi fraus legi fracta est*. And therefore a condition not to marry a particular person was lawful; *si legat' sit, si neq; Titia, neq; sei, neq. mario nupserit, si plures deniq; personæ comprehensæ fuerint, si culibet eor' nupserit, amitteret legat'*, for total restraint appears not, since she marry any other. Dig. l. 35, tit. 1. l. 63, 64.

So if condition be not to marry a merchant widow, any York, &c. Swinb. 4 part. 272, 3.

But suppose a legacy be given upon a precedent fact, that may or may not be done, or to be paid at such a time as may not come; if the fact required be not performed, or the time required never come, by the civil law the legacy is lost, and can never vest.

Dig. l. 39, tit. 2. l. 21, 22. If a legacy be given *cum habes erit, cum in familiam nupserit, cum magistratum inierit, &c. nisi tempus conditione obligit, neq; res pertinere, neq; dies legati cedere potest*.

So Ulpian saith, D. l. 35. tit. 1. l. 41. *Legata sub conditione non statim, sed cum conditio extiterit, deberi incipiunt, neq; interim delegari non potuerunt*.

And

[737]

De Term. Pasch. 13 Geo. 2.

And although where the condition is certain, if the legatee die, though the condition be after performed, when performed the heir shall have it; yet when a legacy given upon a time or fact precedent, which may never happen, if the legatary die before, it shall vest in the heirs.

So Orp. Leg. pt. 3. c. 17. s. 11. If legacy be given in marriage, or twenty-one, till time come, or marriage, the legacy shall not vest.

A difference is there made, and by Swinb. and followed by many cases in law and equity, Dig. 596. in margin 2 Vent. 342. 2 Ver. 137, 508, 673. where the time annexed to the legacy, and where to the performance of the thing given, as at twenty-one, or to be paid at twenty-one.

[738] But in the case of *Yates and Fettiplace*, 2 Vern. 411. Legacy to be paid at twenty-one, or at twenty-one, per Lord Keeper is all one, who said cases cited by Swinb. and Godb. do not warrant the difference.

But be that as it will, it is plain that by civil law a legacy given on a precedent contingency is not payable till the contingency happen.

Hence it appears, that what is said, that the civil law makes no distinction between a condition precedent and subsequent, must be taken with allowance.

The ground of saying so seems to me to be this: A condition impossible, *legibus interdicta* or *prebrosa*, by the civil law, are void, and the legacy is absolute and without condition, and consequently it is not material whether it be precedent or subsequent, since it is null and void. And it would be strange, when the law makes a condition void, and saith the legatary shall be discharged from the condition generally, to say it shall be so only where the condition is subsequent, not where it is precedent.

Besides, every condition by the civil law suspends the legacy, so that tho' it be subsequent, it is not as gifts at common law, actually due to the party, but as it was said before *cum conditio extiterit deberi incipient, & interim legari non possunt*.

So that the meaning is, a condition subsequent by the civil law is of the nature of a condition precedent at common law; the interest does not vest actually, though virtually it does, till the performance of the condition, in negative conditions till caution or security is given for the performance. Swinb. 4 pt. s. 9.

Reported
Yates v.
Fettiplace.
Prec. in Ch.
140.
12 Mod.
276.
2 Eq. abr.
541, c. 10,
653, c. 3.
2 Freem.
243.
1 Lord Ray-
mond, 508.

But I do not observe, that in the case cited by the learned civilians, where the legacy is given on a precedent fact to be performed, that may be performed, or not, that the civil law allows the legacy to take effect till the fact done; and in the instances before given saith, the legacy till performance shall not have effect. [739]

But it hath been insisted, that in many cases the Court hath looked upon these conditions as void, and rejected them, and that in instances as strong as the present case.

That this Court hath decreed the legacy where such condition was subsequent, and no devise over, was before observed; and that it hath as constantly refused to decree it, where there was a devise over, is as evident.

The case Mo. 857. *Gresly and Luther*, was insisted on for that purpose; *assumpsit* on promise made by defendant, in consideration the plaintiff, who was the mother, would give her consent and furtherance to her daughter's marriage with him. *WINCH* held it no consideration, because he said, in *Pigot's* case, it was determined, that a person to whom a legacy was given on condition she married with consent of mother, had sentence for her legacy, though pleaded in bar she did not marry with consent of mother. ^{1 Brownl. 18. Hob. 10.}

This *Pigot's* case is plainly a sentence in the ecclesiastical Court, where such condition is always disallowed; but in the principal case, the consideration was held good by the three other judges; for nature, they said, had given parents the power of disposing their children, and in nature the children are bound to obey them, as appears by the report of the same case. Hob. 10. 1 Roll. Abr. S. 9. 1 Brown. 18.

But three cases have principally been relied on, determined in this Court, as parallel to this.

First, The case of *Fleming and Waldgrave*, Cha. Ca. 58. which was a lease for years to Sir Edward *Waldgrave* and lady, on trust to raise 900l. for a feme sole, in case she did not marry contrary to good liking of Sir Edward and lady; if she did, then to go to such persons as Sir Edward and lady, or survivor should nominate, and for want of nomination, to Sir Edward and lady, or survivor of them; she marries without their consent, they die without any nomination. Bill was preferred by *Sandall*, who had a general deed of gift from Lady *W.* who survived, of all her goods and chattels, against *F. Copleite*, who had administration. ^{1 Eq. cas. abr. 110, c. 3. [740] 1 Cas. Ch. Fine Ch. 2, 58.}

stration to the feme and Lady *W.* to have the benefit of this lease; which was decreed for *Copledite*.

The case is obscurely reported, but here was no nomination, for the gift of all her goods and chattles could not amount to make *Sandall* nominee of this pool.

Here appears no dislike of marriage; for though no consent, it does not appear they disliked it, and the making no nomination is an argument they did not, and so the condition not broken; and this might be the reason the book saith, it was not in the power of the trustees to dispose of the lease otherwise; though the book gives no reason for such saying; but in the case of *Creagh and Wilson*, 2 Vern 572. it is said, there may be a difference between marrying without consent, and marrying against consent, according to the case of *Fleming and Waldgrave*.

1 Eq. abr.
111, c. 6.
Finch. Chs.
rep. 63.

Secondly, The case of *Needham* and Sir *H. Vernon*, resolved temp. Lord *Nottingham*.

The case as reported is, That the daughter of Lord *Kelmurrey* and the son of Lord *K.* prefer a bill to have the benefit of a settlement made by Lord *K.* and his son, whereby trustees were to raise 1500l. a-piece for portions of two daughters, the plaintiffs and the sisters, payable at the marriage with consent of trustees or major part of them, and maintenance in mean time; and if trustees had raised the portions before they married, they were to improve them to the best advantage; and if they married without consent the portion of her so marrying should remain over to another; the trustees received the rents ever since the death of Lord *K.* had raised the portions; and the plaintiffs being in years, and intending not to marry, would lay out the portions in purchase of annuities for their larger maintenance.

[741]

Question was, Whether plaintiffs ought to have portions at their own disposal, before they married with consent.

And it being admitted, if either died before marriage her portion should go to her executor or administrator, and they offering security to indemnify trustees from claim of defendants, who were infants, children of *Charles* Lord to whom portion after marriage without consent was limited by the settlement; the Court decreed it on giving such security.

De Term. Pasch. 13 Geo. 2.

It is evident this decree was not conformable to the usual course of proceedings in equity ; if one may guess upon so short and obscure a report of the case, it seems to be a decree by consent.

The brother *Robert*, who probably was the eldest son of Lord K. and party to the settlement and to the bill, and to whom the benefit of the portions, if not paid, would result, consents his two sisters should have their portions to lay out in the purchase of annuities, for their better support, and so admits they would go to the executor or administrator if they died unmarried ; or perhaps it might be apprehended by the parties, that a sum of money given to daughter to be paid at marriage, like a sum demised to an infant to be paid at his age of 21 years, was an interest vested that would go to the executor or administrator, though the devisee died before the time of payment, and upon such admission, the portions were decreed.

But there was still a difficulty for the defendants to whom the money was limited over, in case the daughters married without consent of trustees ; but the plaintiffs being in years, and declaring they intended never to marry, and being less likely to do so, when their fortunes were turned to annuities, and offering any security to indemnify trustees against the infant's claim, on such security which trustees were willing to accept, the Court decreed the portions to them.

[742]

However it is manifest, that this question, whether the condition annexed to the payment of the portions, that the daughter should not marry without consent of trustees, is good or not, was not the thing under the consideration of the Court ; for they decreed the portions though the daughters never married ; whereas it is agreed on all sides in the present case, that marriage is necessary before the portions be payable, whether the mother's consent is necessary, or not.

But it is most evident the Court looked upon the condition as good, or there had been no need of security to indemnify the trustees. (What need of such security, if the condition was void ?

If it be thought that it may be inferred from this case, that the portions were an interest vested in the daughters, though they died before the time of payment ; it is to be considered, this was only the admission of the parties, no determination of the Court in that matter.

De Term. Pasch. 13 Geo. 2.

But I apprehend it is now a settled point in Courts of Equity, that if lands be settled, or a term of years created on trust to raise portions for daughters, to be paid at age of twenty-one, or marriage, and the daughter dies before the time of payment, the portion shall not go to the executor or administrator of the daughter, but sink in the estate for the benefit of the heir.

So it was held *Pawlett and Pawlett*, affirmed in the House of Lords, 1 Ver. 204, 321. 2 Ver. 397.

So *Tates and Fettiplace*, 2 Ver. 417. Pre. Cha. 140.

So *Bruen and Bruen*, 2 Ver. 439. Pre. Cha. 105.

[743] So *Tourney and Tourney*, Pre. Cha. 290. though the portion was to be paid within a year after the father's death with interest from his death, if the child died within the year.

2 Eq. abr. Thirdly, The case *Semphill & ux* ver. *Baily & ux*
213. c. 6. Pre. Cha. 562.

Gaskill had three daughters, *Sarah*, *Elizabeth* and *Rebecca*; the plaintiff proposed to marry *Sarah* the eldest. *Gaskil* declared if she married him, he would not give her a groat, on which the match broke off; after by will devised his real and personal estate to his executors, to receive 35l. *per ann.* for daughter's maintenance, and if she married with consent of executors, 1000l. in part of her portion; then settles real estate to her use for life, and then to first and other sons in tail; 1000l. to second, and 1000l. to third; she after married the plaintiff without consent of executors. Decreed the 1000l. *per* Lord LECHMERE & Ch. J. KING in duchy, *Dormer cont.*

First, This is a pecuniary legacy, and no devise of the real estate is after devised.

Secondly, It was to be paid at the age of twenty-one or marriage, which seems to supersede what was before mentioned, for the words are positive it should then be paid, but no negative words it should not, if such marriage was without executors consent.

Thirdly, What the Court principally relied on, was that the expression of marriage with consent of executors, was previous, yet it was but a loose inconsiderate way of expressing himself; words that are construed as a condition, must be such as plainly shew it was the intention of the testator the estate or gift should be conditional; if the testator meant is difficult to say; it is supposed he meant she should not marry the plaintiff, but he does

say so; if he meant she should never marry without executors consent, he would not have given it at age of twenty-one, yet the words are general, not confined to marriage without consent under age.

[744]

Since then it is apparent, that the money to be raised is not payable till their marriage with mother's consent, which is a condition precedent to the payment; since even by the civil law, if money be given to be paid at a time or upon an act previous to the payment, nothing becomes due or can be demanded, till the time incurred or the act performed; since no case appears where ever a court of equity decreed trustees to pay portions out of lands given on a condition precedent, that the party should first marry with consent of mother; the matter must be considered as *res integra*; and upon the best consideration of it I have been able to make, I am of opinion that Sir Thomas A's daughters are not intitled to their portions by this settlement, unless on their marriage with their mother's consent.

And the reasons on which I ground my opinion are;

First, That it is the right and liberty of the subject, who makes a voluntary disposition of his own property, to dispose of it in what manner he pleases; this I believe will be universally allowed.

Secondly, That it is a fixed and settled maxim of law, that if an estate in land, or interest out of land, is limited to commence upon a condition precedent, nothing can vest or take effect till the condition performed.

And this is so strong and so settled a point, that it holds although the previous act was at first impossible, or after becomes impossible by the act of God or other accident, the estate can never vest. This is Co. Lit. 205, 219. and is a rule so well known, that I need not cite cases to prove it.

And this being a fixed maxim of the common law, *equi-
sequitur legem*; it is true in courts of equity it has pre-
vailed, and it is reasonable, that where a compensation can
be made, equity will relieve; for since it is the clear intent
of the party, the estate should go to him; so when it was
limited in case he performed such condition, if the per-
formance be prevented by the act of God or other acci-
dent, it is highly equitable, if an adequate recompense
be made to him for whose benefit the condition was de-
signed, that relief should be given, whereby the whole in-
tent of the party may take effect.

[745]

This

De Term. Pasch. 13 Geo. 2.

This relief was heretofore given only on breach of conditions subsequent, the Court being cautious of extending it to conditions precedent.

But the reason being in both cases the same, the Court hath of late years given relief in case of conditions precedent as well as subsequent.

But where the matter lies not in compensations as in conditions not to marry without consent, relief hath never been given, that I have understood.

Eq. ab. 110, This was in the case of *Bertie & ux'* ver. *Lord Falkland*, 2 Ver. 333. 3 Ch. Ca. 189. 1 Salk. 231. solemnly settled on great deliberation by Lord SOMMERS, Chancellor, assisted by Ch. J. HOLT and TREBY, all persons of great eminence and ability.

Mr. Cary by will 1685, devised to trustees, on trust for Mrs. Willoughby his heir at law for her life; and if she married Lord Guildford in three years after his death, then to her first and other sons of that marriage in tail male; if she did not marry, then to Lord Falkland and his heirs.

Treaty of marriage was on foot, some backwardness seemed on Lord Guildford's side, so three years elapsed and no marriage; and after married Mr. Bertie, but could not be relieved.

[746] And it was said in that case, that it would not be easy to find a precedent of relief in a court of equity, in case of a condition precedent.

So in the case of *Creagh & ux'* ver. *Wilson*, 2 Ver. 572 Eq. Abr. 111. c. 5.

A man devised 200l. to his granddaughter if she continued with his executor till 21; but if taken away by her father (who was a papist) before that age, or if she married without consent of executor; then but 10l.

On visit to her father with executor's consent, he married her to a papist. Decreed per Lord KING she should have but 10l. for he looked upon this as a condition precedent and decree of Master of the Rolls *cont'* reversed.

But it was objected, that in the case of *Bertie* and *Lord Falkland*, there was a devise over; but there does not appear any such in *Creagh* and *Wilson*.

But what is the defect of a devise or limitation over?

Where a condition is annexed, not to marry without consent, it is a more full and plain indication of the testator's intention that condition should be complied with, if limited over, in case the consent be not, than if no such limitation

limitation over; because as it is said, there is as full evidence that the testator intended Lord *Falkland* should have the estate, if Mrs. *W.* did not marry Lord *Guildford*, as there was that her issue should have, if she did marry him.

Now if the words of the settlement shew as plainly that Sir *Thomas A.* meant his daughters should not have the pool a-piece to be raised by the settlement, where is the difference if the money had been given away to another?

In the case of *Fry and Porter*, 1 Mod. 308. Ch. Baron *HALE* saith, it is urged there should be no relief, because there is a limitation over; but that I shall not go upon, there have been many reliefs in such cases, but I think none in this; both parties are in equal degree to devisor; it is a voluntary settlement, since intent is as expresse that the person to whom limited should have it, if condition not performed, as the first should be; I think construction should be made to comply with the intention of the party.

Now in the present case the settlement expressly provides, That if any daughter die before she marry with such consent as aforesaid, the sum intended for her portion shall cease, and the estate be exonerated therefrom; or if raised, shall be paid to such person to whom the remainder or reversion shall belong.

This seems to me equally strong as if he had said, it shall be paid to *J. S.* especially if it be considered, that the money doth not yet belong to the daughter; where a legacy is given to another, defeazable upon marriage without consent, there it may be proper to take the money from her to whom it was first given, and vest it in another. in order to shew the fixed and determinate purpose of the testator; for if it be not limited over, the mention of marriage with consent of trustees, executors, or any other, looks rather like advice, recommendation or request to do so, than any resolution that she should lose her legacy if she did not; but where it is upon a condition precedent, the interest is not vested, and consequently cannot be taken from any in whom it never attached, and transferred to another; for as the rule of the civil law expresses it, *cum conditio extiterit, tunc deberi incipiunt, & interim d legari non possunt*. Therefore in such cases it seems more proper to say, the portion shall not be raised, or cease, which was intended Sir *Thomas A.*'s intention, and not to give it from his daughter to another; this is what a court of equity would direct in like case, as appears by Lord *Pawlett's* and the other cases

[747]

[748]

cases mentioned, and argues *Sir Thomas A.* meant the same thing; and therefore the rule *expressio eor' quæ tacite insunt, nihil operatur*, I think not applicable to the present case.

A third reason, which influences me to this opinion, is, that it is most agreeable to the rules of equity, to direct the execution of the trust according to the intent of him who placed the trust in him; it is said a trust is construed with as much advantage as may be to make good and answer the intent and design of the party; but is construed strictly with regard to the execution of the trust; and therefore it would be a strange thing, when the trust directs the trustees to pay the money at the time of the daughter's marriage with her mother's consent; that the Court should direct them to pay the money before that time.

Nothing could justify a Court of Conscience to decree trustees to act so contrary to the express words and design of him that intrusted them, unless it were that the condition of marrying with consent of mother or trustees, is, as it has been suggested, an unsufferable restraint on young women, which encourages a vicious course of life, is a wanton exercise of power in a parent, to subject his children to the arbitrary controul of others in their marriage, not only of their mother, but of estrangers, executors, administrators and assigns.

In case the condition was chargeable with such pernicious consequences, I should think it desirable the legislature should suppress it.

Fourthly, But it is an argument of no small weight in my opinion, that the restraint in the present case, is not only lawful, but prudent and reasonable, and no consequence more likely to ensue from it, than the hindrance of an inconsiderate or imprudent marriage.

[749]

By the *Roman* law, the marriage was null, if made without the father's consent, *nuptiæ consistere non possunt, nisi consentiant omnes in quorum potestate sunt*. Dig. l. 23, tit. 2. l. 2.

Hence *Grotius* observes some went so far as to think the father's consent necessary by the law of nature, to the validity of the marriage, *parentum consensum ad validitatem conjugii quasi naturaliter quidam requirunt*; but that is going too far.

But *Grotius* agrees the proper rule, *filiorum officio conveniens esse, ut parentum consensum impetrant, pleno concedimus nisi manifeste iniqua sit parentum voluntas*. Gro. de jure B. & P. l. 2. ca. 5. s. 10.

De Term. Pasch. 13 Geo. 2.

So Puff: *officiam pietatis & reverentiae requirit, ut & consilium parentum adhibeant liberi, nec ipsor' voluntati resistuntur.* L. 6: ca. 2. f. — p. 365.

By the custom of London, a daughter loses her orphanage share of her father's personal estate, if she marries without his consent, unless he be reconciled to it before his death. *1 Vern. 354. 1 Eq. abr. 156, c. 12.*

Resolved *Foden* and *Hawlet*.

And it is the constant declaration of judges of the law, and in courts of equity, that marriage with the parents consent, is a piece of obedience children owe by nature to their parents.

Nor is this obsequiousness less due to the mother than the father, though the authority and power of the father is greater.

By the civil law the father might devolve the care of his daughter's marriage to the mother, *si in arbitrio matris pater esse voluerit, cui nuptum communis filia collocaretur.* Dig. l. 32. tit. 2. f. 2.

And those who argue against the nullity of the marriage by the law of nature, if made without the father's consent, insist that the mother's consent should be equally necessary with the father's; for in nature they say, *omnibus ex æquo parentibus idem honor habeatur.* Dig. l. 32. tit. 2. not. ad l. 35.

[750]

It was on this argued, that the promise to the mother for her consent, and furtherance of the daughter's marriage, was held a good consideration in the case. *Mo. 857. Gressy and Luther.*

And if the father may require his wife's care in the marriage of his daughter, why not a friend's, as here, if his wife died, or should marry again, whereby she might be less fit for such a trust?

Why may not a man confide, that his friend would take care to make no executor or assignee but such he could rely on, in case his next of kin (who would be his administrator) was not so proper for the trust?

And as to the supposition. That such a trustee may act out of interest, or for by-ends, and so refuse consent without any ground, such proceeding would surely be a breach of trust, which I doubt not but this Court may find means to remedy, as well as in case of other breaches of trust.

But the condition in this case is the more reasonable, since here is a competent maintenance provided by this settlement for the daughter till their marriage with such consent

as

as required; so that they are not left destitute of subsistence, although the 2000*l.* designed in lieu of that marriage, should not be received by them, they have 70*l.* *per annum*, and after the death or second marriage of their mother, 100*l.* *per annum* till married with consent, which is equivalent to the interest of that portion; which seems designed rather as an augmentation of their fortunes, to encourage them not to marry without the mother's consent.

[751]

So that what is required, that they should marry with mother's consent, is not only a lawful, but what seems to me a prudent and reasonable restraint; and consequently I am of opinion the daughters are not intitled to the 2000*l.* to be raised by this settlement until the time of their marriage with such consent.

The schoolmen distinguish between the pain of sense, and the pain of loss; but the *pæna damni* is but improperly called a penalty, and yet that is all the penalty in the present case.

I will proceed to consider the additional portions given by the will, and must admit some difference between them and those by the settlement; for the portions by the will are to be raised out of a personal estate, and not as those by the settlement out of land; for though a term of 500 years is vested in Mr. *White* and *Kenrick*, the defendants, to raise the sum of 3100*l.* and 1000*l.* by sale or mortgage of the lands included in that term, yet that was intended to replace those sums, which had been drawn out of the personal estate, toward the purchase of those lands, and when raised were to be paid to his executors, and be accounted as part of his personal estate; and then the will directs, That out of the money so to be paid by the trustees to his executors, and out of all the other monies, bonds, bills, notes, &c. there should be paid to such of his daughters unmarried, and unprovided for at his decease, 2000*l.* as an augmentation of their fortunes provided for them by the said indenture of lease and release, which are taken notice of and recited in the will;

To be paid at such times, and subject to such conditions, provisions, limitations and agreements, as their original portions are by the said indenture subject and liable.

Now the words of the will must import, that this additional 2000*l.* a-piece by the will must be paid as and in like manner with the 2000*l.* a piece by the settlement; and then it is as if he had said, *I give an augmentation of*
2000*l.*

De Term. Pasch. 13 Geo. 2.

2000l. to each of my daughters, when she marries with her mother's consent.

Or it must import, that Sir Tho. A. meant to give 2000l. a-piece to his daughters absolutely and unconditionally, and then the subsequent words (*to be paid at such times as the original portions*) are a designation only of the time of payment. [752]

But this last construction cannot be put upon the will without great violence to the words. For first, these words (*to be paid at such times, subject to such conditions, limitations and agreements as the original portions are liable to*) must be rejected as useless and insignificant.

Secondly, The 2000l. by the will is meant as an augmentation of the portions by the settlement, and therefore could not be intended to be paid but when the original portions were so, which the will desired to augment.

Thirdly, Here is no express devise or bequest of 2000l. Salk. 415. to each daughter, and then a time limited for the payment as in those cases which have been construed to give a present interest to the legatee, though *solvend in futuro*; as where 100l. is given to a child to be paid at full age, or with interest at his full age. Dy, 39. in margin. God. Orph. Leg. c. 17. s. 11. 2 Vent. 342. 2 Ver. 137, 508, 673.

I say, admitting the distinction holds in personal legacies, where the devise is to J. S. at his full age, or to be paid at age, yet in these cases there is a devise, or disposition of the legacy.

But in this will (as if it was intended to avoid such construction) there is no gift or devise of 2000l. to his daughters in express terms; but a direction, that out of his mortgages, bonds, money, &c. there should be paid to his daughters 2000l. at the time the original portions are payable, which though it may be as effectual in point of operation or benefit, yet it is different in the manner of expression, and it is not a direct gift to the legatee, which is relied on in these cases, as a reason to construe it a present interest in the legatee. [753]

Fourthly, It is provided by the will, that if the daughter died before her original portion becomes payable, the money shall not be paid to her executor or administrator.

But suppose the will can admit this construction, what will be the consequence? Will a court of equity direct the

the payment of the portion presently, when the will directs the payment at the time their original portions become payable, that is, at the time of the marriage with the mother's consent?

So that even upon this construction I do not see how the plaintiff can at present be intitled to these portions.

But taking the will to import, that the augmentation of the portions designed by the will shall become due to the daughters, when they marry with the mother's consent, the only question that will remain is this:

Whether when a man devises 2000l. out of his personal estate to his daughter upon a condition precedent, that is, upon her marriage with the mother's consent, it be proper for a court of equity to decree the payment of such portion on her marriage without such consent?

What one might in compassion wish or desire is not to have place in a court of justice; which is not to make men's wills, but to compel the performance of them, according to the true intent and meaning of the testator, as far as it can be collected from his words, and as far as is consistent with the rules of law and conscience.

[754] Now that it was Sir *Tho. A.*'s real intention, that his daughters should have only the maintenance of 70l. or 100l. *per annum*, unless they married with the mother's consent, and that the 2000l. by the settlement and 2000l. by the will should not be paid them, unless they did so, seems to me evident upon what I have already observed; and when by his codicil he adds all other his estate subject to his wife's jointure (except his *Cheshire* estate) to the term of 1000 years, vested in Serjeant *Cheshire* for the better raising his daughters portions; by indenture 1712 he is so cautious, that the same are therein and thereby appointed to be raised and paid; which shews it was his fixed and permanent intention.

And though in the trust of the *Cheshire* estate limited to Serjeant *Cheshire*, till his sons are of 25 years, to raise maintenance for his sons till that age, he directs the residue of the profits to be applied towards payment of the said portions for his daughters, which is a new trust; I see not how it can be thence inferred, that the portions should be paid otherwise than before directed.

This being Sir *Thomas A.*'s settled intention, why should it not prevail?

The

De Term. Pasch. 13 Geo. 2.

The condition from what I have said appears to me to be lawful.

A condition precedent to any other personal legacy, must be performed before any interest or title to the legatee can accrue.

By the civil law, as was before said, a legacy given *cum pubescerit, cum in familiam nupserit, &c. nisi tempus conditione obtigit, neq; res pertinet neq; dies legati cedere potest.* Dig. l. 36. tit. 2. l. 21, 22.

Is there any instance in the common law, any instance in this Court to the contrary?

I have not heard any; the only case that hath the ^{2 Eq. Caf.} semblance of a condition precedent, is that of *Semphill & 213, c. 6.* [755]
Ux. ver. Baily, Pre. Ch. 562.

But the judges who decreed that case, looked upon it as a loose inconsiderate way of speaking, it appeared not he meant it to stand as a condition precedent to his daughter Sarah's portion of 1000l. which he meant she should have at her age of 21, or marriage, without saying such marriage should be with consent; and to another daughter, the words were thrown in between the 1000l. given her in money, and what was settled on her in land.

In the case of *Creagh and Wilson*, which was a personal legacy given on a condition precedent which was not performed, and therefore not obtained in this Court. ^{Ante 743.} 2 Ver. 572.

In the case of limitation over, it is admitted, that a personal legacy given on a condition not to marry without consent, should be lost if the condition be broken.

In this case the residue of his personal estate, not by him before given and bequeathed, is expressly given to his wife, which is equivalent to a limitation over, if that were necessary, where the condition is precedent and never performed. ^{Prec. in Ch. 226. 2 Eq. abr. 212, c. 2.}

In the case of *Creagh and Wilson*, there was no limitation over.

In the case of *Aston and Aston*, 2 Ver. 452. (which seems to be in this very family) the limitation over was only to make good the portions of his other daughters, if any deficiency, or otherwise of his sons; and that being a condition subsequent, and thought somewhat an hard case, might make Sir Thomas A. so careful in the present, to give his daughters their portions upon the like condition, but to require it should be precedent to the payment of them.

Fifthly,

Fifthly, The only reason why courts of equity have come in to allow legacies given on condition to be void, if the legatees marry without consent, seems to be to keep up a conformity between the determinations of this and the ecclesiastical courts, where such a legacy would not be defeated though the condition subsequent should be broken, and the legatee marry without consent.

[756]

But suppose the question in this case was in the ecclesiastical courts; a pecuniary legacy is given to be paid to a daughter when she marries with her mother's consent, will the ecclesiastical court decree it before such marriage?

Salk. 415.

The difference Swinb. 4 pt. f. 17, f. 308, takes, is where a legacy is given at a certain time, and where to be paid at a time uncertain; for so he says it is lawful for the testator to do; in the first case he saith, the legatee, or if he die, his executor may demand, and recover the legacy after the time is past, unless the meaning of the testator be contrary, or it be a personal service that cannot be transmitted; but if the legacy be given after an uncertain time, the legatee dying in the mean time, his executor or administrator cannot demand it, but is utterly excluded; As if a man gives 100l. when his daughter shall be married, if he die before marriage of the testator's daughter, the legacy is utterly extinguished; so if 100l. given when his son shall die, though it be certain he will die, yet if legatee die before his son's death, the legacy is extinguished as if it had been conditional. And the principal cause why a legacy given after another's death is reputed to be conditional, he saith, is because it is not only uncertain when he will die, but whether he will die before the legatary, and consequently the intention of the testator seems to be, that the legacy should not be transmissible.

And he saith it is not material, whether the uncertainty be joined to the substance of the bequest, or to the execution of it, for in both cases the legacy is reputed conditional; as if I give *A.* 100l. when my daughter shall marry to be paid when my daughter marries, for if *A.* die before her marriage, in either case the executor cannot demand it.

This is agreeable to what Lord KING saith, *Yates and Fettiplace*, 2 Vern. 417.

The

De Term. Pasch. 13 Geo. 2.

The intent of the testator is the predominant rule to be [757]
observed. Swinb. 314.

In all legacies, two effects of right of legatee are necessary to be considered.

First, That which makes him master of the thing, whether he may demand it or not, as yet.

Secondly, That which puts him in a condition to demand it: Of the first it is said, the time is come when the legacy vests and becomes due; of the second, the time is come when he may demand it.

If legacy is pure without terms, it is due and may be demanded at death of testator; term prescribed, it is due at death of testator, and may be demanded when the day or term of payment comes; if condition added, both effects take place when condition is performed. Dom. l. 4. tit. 2. f. 9. H. 7. f. 180. 74.

If the right is vested, he transmits it; if time not come when legacy was due, he does not transmit it. Dom. ib. 8. 10.

Legacies left to an uncertain time are conditional. Ibid. term of an uncertain day implies a condition.

The Lords Chief Justices Sir WILLIAM LEE, and Sir JOHN WILLES, who assisted the Lord Chancellor HARDWICKE upon this appeal, being of the same opinion, his Lordship was pleased to concur; and thereupon the decree of his Honour the Master of the Rolls was reversed.

A TABLE

Dr. James P. Smith - 1842

Received of the undersigned the sum of \$100.00

for the purchase of the land in the

County of ... State of ...

the sum of \$100.00

for the purchase of the land in the

County of ... State of ...

the sum of \$100.00

for the purchase of the land in the

County of ... State of ...

the sum of \$100.00

for the purchase of the land in the

County of ... State of ...

the sum of \$100.00

for the purchase of the land in the

County of ... State of ...

the sum of \$100.00

for the purchase of the land in the

County of ... State of ...

the sum of \$100.00

for the purchase of the land in the

County of ... State of ...

the sum of \$100.00

for the purchase of the land in the

County of ... State of ...

the sum of \$100.00

for the purchase of the land in the

County of ... State of ...

the sum of \$100.00

for the purchase of the land in the

County of ... State of ...

the sum of \$100.00

for the purchase of the land in the

County of ... State of ...

the sum of \$100.00

for the purchase of the land in the

County of ... State of ...

the sum of \$100.00

for the purchase of the land in the

County of ... State of ...

the sum of \$100.00

for the purchase of the land in the

County of ... State of ...

the sum of \$100.00

A T A B L E O F The Principal Matters.

Abatement.

- Case*
105 **P**LEA in abatement shall not be avoided by another original *Page* 157
185 Plea in abatement, that defendant was a mercer, and no gentleman, as named in the writ, held good 371

Account.

- 263 Court refused to order an account in equity for an attorney's bill taxed by prothonotary of C. B. 612
195 An account directed for all monies received on the sale of stock pledged, notwithstanding the day of redemption was past; it not appearing that the defendant had sufficient stock at the day. 393

Acceptance.

- 49 Bill of exchange, how it shall be accepted 75

Acts of Parliament.

- Case*
33 Where an act of parliament shall have the effect of a recovery *Page* 50

Administration.

- 10 If letters of administration are lost, new letters of administration may be granted after the action brought 18
72 Administration *durante minore ætate* of one intitled to the administration doth not determine until the infant hath attained the age of 21 18
107 Administration during the minority of another, shall not cease till his age of 21 years 159
9 Grant of administration when well pleaded 17

Administrator.

- 104 If plea to an action brought by one as administrator, that A. made

TABLE OF THE PRINCIPAL MATTERS.

Case

- an executor, he ought to traverse that *A.* died intestate. Page 156
- 57 Judgment against administrator by confession or default, (*pendente lite*), is an admission of assets, and he is estopped to say the contrary on a *devastavit* returned 87

Admiralty.

- 47 Prohibition shall go to the admiralty in a suit for the wages of a master of a ship. 74

Admission.

- 135 Where persons have a right to their freedom, the tortious refusal of the mayor does not make their votes void, for admission is but a ceremony. 243

Advowson.

- 181 A grant of a manor with all advowsons, &c. thereunto belonging, will not extend to advowson severed in ancient times, though it was appendant to the manor 300 years ago 362

Agreement.

- 178 Whether a contract for ten shares of stock is within the statute 29 *Car.* 2. which enacts, that no action shall be brought upon any contract not to be performed within the space of one year, unless such agreement or memorandum be in writing, and signed by the party, &c. 354

Alienation.

- 277 Whether a defendant after a decree against him shall, before execution

Case

- cution sued, by alienation prevent the plaintiff taking his lands upon sequestration Page 712

Amendment.

- 39 Amendment, where it shall be 60
- 139 A misprision of the plaintiff's name instead of the defendant's, amendable after verdict without defence 250
- 187 The plaintiffs in record of *Nisi prius* omitted the words, *et predict. quer. scilicet*; but it was held amendable by the original record 376
- 191 A mistake in a recovery whereby two of the villis were omitted, allowed to be amended by the deed that led the uses 386
- 244 The mistake of the name of a third person is not aided or amendable, though a misnomer of the plaintiff or defendant is 566
- 252 *Viscomiti Lond. præcipimus tibi*, instead of *Viccomitibus Lond. præcipimus vobis*, held amendable after verdict 580
- 197 Amendment, when allowed 418

Answer.

- 256 Answer falsified by one witness sent to trial 587

Antient Demesne.

- 62 Fine levied of lands in antient demesne, what effect it will have 9

Appearance.

- 71 Writ when aided by appearance of the defendant 10

Appeal of Murder.

- 142 Where the court quashes all proceedings on a writ of appeal for murder

TABLE OF THE PRINCIPAL MATTERS.

Case.

murder, appellant may be admitted to prosecute his appeal by bill against appellee *in custod. Mar.*

Page 257

Appeal.

- 43 Order of removal not appealed from conclusive to all the world

71

Appendants.

- 181 A grant of a manor with all advowsons, &c. thereunto belonging, will not extend to an advowson severed in ancient times, though it was appendant to the manor 300 years ago 361

Assets.

- 123 If an executor pleads bonds and judgments, and no assets *ultra* the judgments, and the plaintiff replies that the bonds were fraudulent, and it is found against him he cannot have judgment though the assets are found to be *ultra* the judgments pleaded 20
57 Judgment against an administrator by confession or default *pendente lite*, is an admission of assets, and he is estopped to say the contrary on a *devastavit* returned 87

Assignment.

- 28 A drawer of a bill of exchange, though given without consideration, shall not be relieved against a third person to whom it is assigned for an honest debt 43

Assumpsit.

- 67 It is sufficient to maintain an *Assumpsit* if the consideration was a

Case.

benefit to the defendant, or a prejudice to the plaintiff Page 98

- 59 *Assumpsit* to deliver oatmeal on board a vessel, to be brought by the defendant, on or about the 18th of January; breach that he did not deliver upon the 18 is good after verdict 89

Attainder.

- 133 A person restored after an attainder for high treason shall have the same equitable interest in every part of his estate as he had before the attainder 237

Attachment.

- 226 An attachment returnable before the full term, if after the *Effoinday*, which is strictly the first day of term, held good 547

Attorney.

- 144 Words, *That I never forged any man's hand, but you are a forging rogue*, when spoken of an attorney, held actionable 262

Attorney's Bill.

- 263 Court refused to order an account in equity for an attorney's bill taxed by prothonotary of C. B.

612

Avowant.

- 26 An avowant in replevin may abate his own avowry for part of the rent distrained for before, but not after judgment 42

Averment.

- 247 In a *scire facias* on a recognizance of bail defendant demurred because

TABLE OF THE PRINCIPAL MATTERS.

Cafe

because it was not sufficiently averred that the plaintiff was the same person to whom they were bound; but held no cause of demurrer

Page 573

Award.

- 75 Submission to an award good though only conditional 114
- 115 When one undertakes to submit to an award for another, where it shall be adjudged good or not 183
- 167 An award held good, notwithstanding some objections in point of form 328
- 225 A submission of all matters in differences, imports all matters which either party had jointly or severally against each other 547

Bail.

- 232 **R**ENDER of a prisoner by his bail is not compleat till the fees are paid 554
- 48 Special bail need not be given in an information or action *qui tam* on a penal statute 75
- 235 Bail shall be given in action of debt on a judgment, notwithstanding a writ of error, if no bail in the original action, otherwise not 556

Bailment.

- 90 Where an action on the case lieth on bailment or undertaking 133

Bailiff.

- 189 Where a bailiff is charged directly with a tort, it ought to be shewn that he is a bailiff of a Liberty who has return of writs; but otherwise it is sufficient to shew ge-

Cafe

nerally, that he is such a person as has authority to take bail

Page 378

Bankrupt.

- 92 Where a bill drawn upon a person who becomes a bankrupt the next day, shall not be deemed good payment 138
- 73 Composition made by virtue of the statute against bankrupts to be pleaded 111
- 122 Bankruptcy, how it should be pleaded 209

Bill of Exchange.

- 37 Bill of exchange, where the receipt of it shall be tantamount to the receipt of the money 5
- 49 How it shall be accepted 7
- 28 A drawer of a bill of exchange though given without consideration, shall not be relieved against a third person to whom it was assigned for an honest debt 4
- 160 An original bill, payable to order or his order, is assignable afterwards to whomsoever it is endorsed, though the words, or his order, be omitted 31

Bond.

- 126 In an action upon a bond with special condition there must be a particular act shewn by which the plaintiff is interrupted, otherwise the breach of condition not well assigned 2

Borough.

- 148 A bye-law to restrain persons from exercising a trade not being free of a borough, held void 2

Broad

TABLE OF THE PRINCIPAL MATTERS.

Case.

Breach.

- 59 *Assumpsit* to deliver oatmeal on board a vessel, to be brought by the defendant, on or before the 18th of *January*; breach that he did not deliver upon the 18th is good after verdict Page 89
 98 In covenant breach assigned ought to be positive and certain 146

Breach of Trust.

- 200 Whatever a trustee does to prevent the intention of his testator is a breach of trust, and ought to be set aside 423

Bye-Law.

- 148 A bye-law to restrain persons from exercising a trade not being free of a borough, held void 269

Cattle.

- 14 **T**URNING cattle into tithe makes it a fraudulent severance 22

Carrier.

- 16 A hackney coachman not a carrier to be charged upon the custom of the realm 25

Certiorari.

- 54 A *certiorari* lies to remove an order of justices of the peace upon a private act of parliament 86

Chambers.

- 20 Whether chambers in an inn of chancery are within the words or intent of 43 *Eliz.* rateable to the poor 534

Case

Chose in Action.

- 280 Husband dying before legacy was payable to his wife, is in the nature of a *chose in action*, which will survive to the wife Page 725

Clergyman.

- 59 Where a prohibition shall be granted to the spiritual court where a libel is for words spoken of a clergyman, though they immediately regard his function 309

Clover Seed.

- 269 Tithe for clover seed due to vicar 633

Codicil.

- 190 A codicil signed and published in the presence of three witnesses, held a republication of the will, and that both made but one will 381

College of Physicians.

- 50 Power of the censor of the college of physicians 79

Common Bail.

- 63 Where the plaintiff hath been nonsuited for a defect in the declaration, the defendant shall be admitted to common bail in a new action brought 94

Commission of Review.

Obsolete, repealed by statute, &c.

Commitment.

- 15 A custom to commit for refusing to come upon livery in the vintners company, held good 24

Composition

TABLE OF THE PRINCIPAL MATTERS.

Case

Composition.

- 73 Made by virtue of the statute against bankrupts, how to be pleaded

Page 112

Condition.

- 128 Whether words in the condition, which are repugnant to the plain intent of the parties, shall be rejected

231

Condition Special.

- 126 In an action upon a bond with a special condition, there must be particular act shewn by which the plaintiff is interrupted, otherwise the breach of a condition for a quiet enjoyment is not well assigned.

228

Condition Subsequent.

- 214 The non-performance of a condition, tho' subsequent, sufficient to bar the plaintiff's title to what ever he claimed upon such condition

513

Conditional Promise.

- 36 A conditional promise will avoid the statute of limitation

45

Contingent.

- 41 Remainder, when it is contingent, and when it vests.

62

Consideration.

- 67 It is sufficient to maintain *assumpsit*, if the consideration was a benefit to defendant, or a prejudice to the plaintiff.

98

Case

Contract.

- 32 A contract performable as well before as after a day mentioned in the statute 8 & 9 W. 3, at the election of the party, is not within that act of parliament Page 49
178 Whether a contract for ten shares of stock is within the statute 49 Car. 2. which enacts that no action shall be brought upon any contract not to be performed within the space of one year, unless such agreement or memorandum be in writing, and signed by the party, &c. 354
182 In a contract for stock it must appear by the register itself to whose use the contract was made 365

Contempt.

- 145 Sheriff cannot take bail-bond upon attachment for a Contempt

264

Conviction.

- 152 A conviction *super Præmissis* for three penalties of 5l. each for killing three hares, where it appears it was done the same time, is bad, for the statute does not give 5l. for every hare, it being but one offence 274
88 In a conviction on 43 Eliz. cap. 7. for cutting down trees, the number and quantity of trees ought to be mentioned expressly 131
88 A conviction of a papist, where good. Avoidance of a church before conviction forfeited by the conviction 169

Conveyance.

- 135 A conveyance cannot operate by way of covenant to stand seised, where

TABLE OF THE PRINCIPAL MATTERS.

Cafe

where the intent of the party who conveys appears to be contrary to such a construction *Page 242*

Copyhold.

- 171 A devise of all his estate whatsoever, comprehends all that a man has, real or personal; and when there is a surrender to the uses of his will, a copyhold estate will fall under the same construction *337*
- 58 A copyhold estate surrendered to several, equally to be divided, and to their respective heirs, is not a joint estate, but an estate in common *88*
- 52 Surrender of a copyhold to the deputy of a deputy steward out of court, is good *84*

Copyholder.

- 44 If a lord of a manor cut down trees, where a copyholder may take them for repairs, trespass lieth *71*

Corporation.

- 55 An action lies again members of a corporation by their private names, for a false return to a *mandamus* by their corporate name *86*

Cost.

- 110 Where an executor shall pay cost in trover *162*
- 12 Cost when given upon the statute of 22 & 23 *Car. 2.* *29*
- 85 Plaintiff in replevin shall not pay cost when the writ abates *122*

Cafe

Covenant.

- 268 Covenant to repair binds though the house be burnt *Page 627*
- 169 A covenant, though good in its creation, may be extinguished afterwards by the death of the covenantor to whom the covenantee was heir *333*
- 188 In covenant the plaintiff by his replication assigns several breaches to which the defendant does not rejoin, though the plaintiff cannot waive the breaches, (being entered on the roll) yet he may take judgment for want of the rejoinder *376*
- 127 A covenant to enjoy without disturbance generally, shall be construed a disturbance by legal title; but where a man covenants express against those who claim or pretend to have a right, the breach is well assigned though the disturber has no legal right *230*
- 98 In covenant breach assigned ought to be positive and certain *146*
- 113 What shall be judged a good breach of covenant *180*

County in Margin.

- 239 The county being in the margin will supply the want of it in the declaration *562*

Custom of the Realm.

- 16 A hackney coachman not a carrier, to be charged upon the custom of the realm *25*

Custom.

- 15 A custom to commit for refusing to come upon the livery in the vintners company, held good *24*
261 *Cuf-*

TABLE OF THE PRINCIPAL MATTERS.

Cafe

- 261 Customs or prescriptions only triable at common law Page 603

Custom-house Officer.

- 234 In an action *qui tam* on Stat. 9 *Ann.* against a custom-house officer, the plaintiff hath a right to inspect town books, and copies to be used at the trial 555

Damages.

- 38 **A**N action lieth not for general nuisance where a particular damage to the plaintiff is not laid 58
129 Judgment shall not be arrested after verdict where entire damages are given, though part of the time was to come at the time of trial 231
166 In an action upon the statute 13 *Ed. 1.* for a robbery, it ought to appear the plaintiff has the whole property in the money of which the robbery was committed, otherwise, if entire damages be given, it will be bad *in toto* 327

Deduction.

- 264 Board not deducted out of money due unless agreed 613

Defeasance.

- 445 In a defeasance to a bond it is not necessary to recite the bond 568

Devastavit.

- 57 Judgment against an administrator by confession or default *pendente lite* is an admission of assets, and he is estopped to say the contrary on a *devastavit* returned 87

Cafe

Devisee.

- 60 A devisee not a sufficient witness to a will within the statute of frauds Page 90

Declaration.

- 76 Declaration in an action on the case for a way when helped by a verdict where the particular sort of way is not shewn 114
80 Where helped by verdict 116
5 Where the plaintiff is not obliged in his declaration to shew any title in himself 7

Delegates.

- 205 Where parties are dissatisfied with what two delegates do *in actis ordinariis*, such as settling allegations, &c. the matter may be brought under the consideration of the condelegates 446

Demurrer.

- 157 The stat. 4 & 5 *Ann.* does not give any remedy upon demurrer, but in matters of the same nature with those which are there specified 305
70 Where the court will not hear any argument about the plea on a demurrer before the trial of the issue 109
78 On a general demurrer duplicity not fatal 115

Deputy.

- 192 Extent shall go for the King's money against any one that imbezils it, but not where monies due to the king is paid and his security cancelled before bond given by deputy to principal for balance in his hands 388

Deposit.

TABLE OF THE PRINCIPAL MATTERS.

Case

Deposit.

- 209 Not reasonable to decree a deposit back which is made by way of security to any one, where the person had the proper power and authority to make it Page 462

Departure.

- 230 When the defendant by his rejoinder departs, it is good cause of demurrer 553

Devise.

- 230 Where there is no devise antecedent, he first son of the wife cannot take by way of remainder 232
- 271 A devise of all his estate whatsoever, comprehends all that a man has, real or personal; and when there is a surrender to the uses of his will, a copyhold estate will fall under the same constructions 377
- 277 No one shall take against the heir without an express devise to him 553
- 284 A devise to *E. H.* and her heirs, and if she and *D. S.* die without issue, he gives several annuities charged upon the premises to charitable uses; held that *E. H.* had an estate in fee 542
- 286 A devise that if *William* the eldest son of the testator should happen to die without issue, that then and not otherwise, after *William's* death, he devised it over to his son *Richard* and his heirs; held that *William* took an estate-tail by implication 372
- 45 Where the same estate is devised to a man which he would have taken by descent notwithstanding the possibility of a charge 72

Case

- 51 What words will make an estate-tail in a devise Page 82
- 86 Where an heir at law shall take by devise, and not by descent 123
- 111 When it gives an estate in fee 164
- 118 A devise to one for Life, and then to be at her disposal, provided she disposed of the same after her death to any of her children, held only an estate for Life in the mother 194

Descent.

- 208 Entry toll'd by descent and non-claim 457
- 45 Where the same estate is devised to a man which he would have taken by descent, he shall be in by descent notwithstanding the possibility of a charge 72
- 86 Where an heir at law shall take by devise, and not descent 123

Deputy.

- 52 Surrender of a copyhold to the deputy of a deputy steward out of court, is good 84

Disability.

- 158 In a plea of disability of the plaintiff, that he was a recusant convict, that he did not take oaths at the quarter sessions, it is not enough to say, *Et hoc paratus est verificare*, unless it adds *per Recordum* 307

Discovery.

- 274 Bill for discovery of matters proper at law, not proper for relief in equity 694
- Dis*

TABLE OF THE PRINCIPAL MATTERS.

Cafe

Disturbance.

- 127 A covenant to enjoy without disturbance generally, shall be construed a disturbance by legal title; but where a man covenants expressly against those who claim or pretend to have a right, the breach is well assigned, though the disturber has no legal right Page 230

Distress.

- 121 When corn taken in execution may be distrained 204

Distribution.

- 3 Executors not obliged to make distributions according to the statute 22 & 23 Car. 2. 3
56 There shall be no representation after brothers and sisters children 87

Discharge.

- 42 Where marriage shall discharge a bond to a feme obligee 67

Dignity of the Court.

- 278 Where demand is below the dignity of the court, the bill shall be dismissed without entering into merits 715

Dower.

- 253 In dower plea of lessee for years ought not to be received after plea and judgment for demandant 581
116 Tenant in dower shall not have execution of a reversion after a term 185

Cafe

Drawback.

- 211 Money received for the drawback of goods and merchandize not fairly exported according to the statute, liable to the King's demand though in the hands of a third person not *Particeps criminis* Page 481

Duplicity.

- 78 On a general demurrer duplicity not fatal 115

Durante minore aetate.

- 107 Administration during the minority of another shall not cease until his age of 21 years 159

Enclosure of Common.

- 172 **N**o one can maintain action on the case for enclosing Common but those who have a particular right (or shew special damage), and though he hath special damage, he hath no right to his demand without alledging a prescription 344

Entry.

- 208 Entry toll'd by descent and non-claim 457

Error in Parliament.

- 198 Within what time error in Parliament may be brought 420
259 Error in fact not assignable in the Exchequer chamber 597

Error.

- 77 Error for want of an original is not compleatly assigned until the certificate is returned 115
83. Error

TABLE OF THE PRINCIPAL MATTERS.

Case

- 83 Error for want of an original, another original allowed by the Court of Chancery

Page 118

Ejectment.

- 74 In an ejectment against several, if one only confess lease, entry and ouster, and the others do not, how the verdict shall be

113

Escape.

- 199 In an action for an escape, defendant allowed to plead double

422

- 231 In an action for an escape, defendant pleads the prisoner escaped and returned before the action brought, without his knowledge, and was in execution for the damages on the said judgment; and it was held well, it being well tantamount to a retaking on a fresh pursuit

554

- 103 Officer chargeable for an escape of a person where action arises out of the jurisdiction of the court by whose process he was taken

153

Estate in Fee.

- 165 What words in a will shall make an estate in fee, and what not

323

Estate in Tail.

- 51 What words will make an estate-tail in devise

82

- 154 A limitation to one to take and enjoy the profits of an estate during his life, and after his decease to the heir male of his body, would make an estate-tail, where nothing appears that explains the testator's intent to the contrary, otherwise not

289

Case

- 184 A man devises to his wife in tail general, remainder to J. S. in fee, and the wife with a subsequent husband suffers a recovery; held good against the heir of the devisor, notwithstanding the statute 11 H. 7. cap. 20.

Page 369

- 186 A devise, that if William the eldest son of the testator should happen to die without issue, that then and not otherwise, after William's death he devised it over to his son Richard and his heirs; held that William took an estate-tail by implication

371

- 222 If an estate be given to a man and his heirs, and if he die without issue, remainder over, these words are explanatory of the word heir, and make an estate-tail

539

Essoin-day.

- 226 An attachment returnable before the full term, if after the Essoin-day, which is strictly the first day of the term, held good

547

Evidence.

- 151 In an action founded upon an injury, every thing that shews that the defendant did what he might lawfully do, may be given in evidence upon Not guilty pleaded

373

Execution of powers.

- 162 Of the execution of powers in regard to making of leases

312

Execution.

- 164 Upon a writ of error brought after judgment, execution ought not to be paid, if bail be not found

321

82 Exe.

TABLE OF THE PRINCIPAL MATTERS.

Cafe

- 82 Execution bearing date, teste before judgment signed, when good
Page 117
- 24 There may be an execution of goods after a first *Fieri facias* that has not been executed 35
- 121 Where corn taken in execution may be distrained 204
- 125 If a trustee has conveyed lands before execution sued, tho' he was seised in trust for the defendant at the time of the judgment, the lands cannot be taken in execution 226
- 277 Whether defendant after a decree against him shall, before execution sued, by alienation prevent the plaintiff taking his lands upon the sequestration 712

Executor.

- 3 Executor not obliged to make distribution according to the statute of 22 & 23 Car 2. 3
- 102 Executor may traverse the devise of an executorship to another. Payment to an executor having a probate, if the probate is afterwards repealed, does not discharge the party against the legal executor 150
- 110 When executor shall pay cost in trover 162

Exchequer Chamber.

- 239 Error in fact not assignable in the Exchequer-chamber 597

Exigent.

- 241 An exigent is superseded by a writ of error 564

Extent.

- 192 Extent shall go for the King's money against any one that embezzles

Cafe

it, but not where monies due to the King are paid, and his security cancelled before bond given by deputy to principal for balance in his hands
Page 388

Feme Covert.

- 266 COURT may order Feme Covert who is an infant, being heir or trustee, to levy a fine 615
- 42 Where marriage shall discharge a bond to a feme obligee 67

Fee-simple.

- 111 Devise when it gives an estate in fee 164

Fera natura.

- 23 When a person may be said to have a property in what is called *Fera natura* 34

Fine.

- 62 Fine levied of lands in ancient demesne, what effect it will have 93
- 20 Deeds to lead the uses of fines 29

Forcible Entry.

- 40 Restitution ought to be made immediately upon a conviction of a forcible entry 61

Fire.

- 22 Where an action of the case lies for negligently keeping his fire in his close, by which the plaintiff was damaged 32

Fieri

TABLE OF THE PRINCIPAL MATTERS.

Case

Fieri Facias.

- 24 There may be an execution of goods after a first *Fieri Facias* that has not been executed Page 35

Fresh Pursuit.

- 231 In an action for an escape defendant pleads, that the prisoner escaped and returned before the action brought, without his knowledge, and was in execution for the damages on the said judgment; and it was held well, it being tantamount to a retaking on a fresh pursuit 554

Frauds.

- 119 Where a will is well executed within the statute of frauds 197
60 A devisee not a sufficient witness to a will within the statute of frauds 91

Gaming.

- 4 **W**HERE a man shall avoid a bill for money lost at play, by the statute of 16 Car. 2. 4

Game Act.

- 215 Conviction of persons unqualified in 5l. penalty for every hare, when held good 522
152 A conviction *super præmissis* for three penalties of 5l. each for killing three hares, where it appears it was done the same time, is bad; for the statute does not give 5l. for every hare, it being but one offence 274
249 In action of debt upon the statute 4 & 5 Ann. for keeping and

Case

using a dog to kill the game, it is necessary to shew what sort of dog it was Page 576

Heir.

- 174 **U**PON a settlement of Lands to be sold in trust for several purposes, the residues given to B. and his heirs, reserving only 200l. to be paid to such person as the donor should by writing under his hand direct, who died without any such direction, the 200l. will go to his heir, and not to B. or his assigns 345
177 No one shall take against the heir, without an express devise to him 353
108 Settlement by the heir on the part of the mother to the use of himself in fee, shall be to the old use 160

Herefy.

- 120 In a libel for herefy the refusal of a citation by the Dean of the Arches, held a good cause of appeal to the delegates 199

Highway.

- 210 On a special verdict in an indictment for a robbery on the highway, the words, *then and there immediately*, do not sufficiently ascertain the time to find the prisoner guilty 478

High Treason.

- 133 A person restored after an attainder for high treason shall have the same equitable interest in every part of his estate, as he had before the attainder 237

Honi-

TABLE OF THE PRINCIPAL MATTERS.

Case

Homicide.
8 When it is murder Page 13

Hundred.

175 An action lies upon the statute 13 *Ed.* 1. against the Hundred for a robbery committed on a *Sunday*, notwithstanding 29 *Car.* 2. if it appears that the person robbed was only going to his parish church 345

Jeofail.

223 IF action be laid in one county and the *venue* in another, it is a Jeofail, and helped by the 4 *Ann* 555

Indorsement.

160 An original bill, payable to one and his order, is assignable afterwards to whomsoever it is endorserd, though the words, *or his order*, be omitted 311

Inducement.

155 Inducement to a traverse insufficient where the traverse is a thing immaterial 302

Infant.

266 Court may order Feme Covert who is an infant, being heir or trustee, to levy a fine 615

Inferior Court.

248 In justifying under the process of an inferior court, it is necessary to shew that the precept levied was within the jurisdiction of the court 574

Case

Information

134 An information shall go against the Mayor where the persons intitled to their freedom, and demand admittance, are refused Page 240

Insurance.

180 When insurance is, interest or no interest, the plaintiff has no occasion to prove his interest, for defendant cannot controvert that 360

Intention.

135 A conveyance cannot operate by way of covenant to stand seised, where the intent of the party who conveys appears to be contrary to such a construction 242

Immuendo.

27 An information for perjury shall not be supplied by the *Immuendo* 43

Jointenants.

58 Copyhold estate surrendered to several, equally to be divided, and to their respective heirs, is not a joint estate, but an estate in common 83

Joint Obligation.

93 Action upon a joint obligation will be bad, if it does not appear that all executed it 139

Irregularity.

89 A Sheriff shall not take advantage of his own irregularity to excuse himself in an action 132

TABLE OF THE PRINCIPAL MATTERS.

Case

Issue.

- 100 In an immaterial issue defendant shall plead again though after a verdict for plaintiff Page 148
 119 Sufficient to insert in the copy of the issue, by way of replication to a plea of *Nul. tale Record. Quod habetur tale Recordum*, though not under counsel's hand 533

Judgments.

- 123 If an executor pleads bonds and Judgments, and no assets *ultra* the judgments, and the plaintiff replies that the bonds were fraudulent, and it is found against him, he cannot have judgment though the assets are found to be *ultra* the judgments pleaded 206
 129 Judgment shall not be arrested after verdict, where entire damages are given, though part of the time was to come at the time of trial 231
 21 The benefit of a judgment against husband and wife shall survive to the plaintiff 31
 6 When it shall be taken upon the plea, and when upon confession or *Nil dicit*. 8
 127 Where the trespass is confessed by the defendant in his plea, the plaintiff shall have judgment though a verdict be found for the defendant 548

Jury.

- 133 If the jury is discharged at the assizes for a view, there is no need of a *Venire facias de novo* 248
 116 Verdict set aside where the Jury cast lots how they shall give it 525
 118 Whether it shall be left to a jury to determine whether the wit-

Case

- nesses to a will (being all dead) set their names in the presence of the testator, merely upon circumstances, without any positive proofs Page 531
 260 Where a new trial shall be granted for a misbehaviour in one of the Jury 601

Jurisdiction.

- 103 Officer chargeable for an escape of a person where action arises out of the jurisdiction of the court by whole process he was taken 153

King's Debtor.

- 201 IF the King's debtor dies, he may pursue his remedy against his executor at any time 433

Land-Tax.

- 149 A Term for years held a qualification for a Commissioner of the Land-Tax 270

Leases.

- 25 Power to make Leases when well pursued 37

Levitical Degrees.

- 163 Marriage of the daughter of the wife's sister held within the *Levitical* degrees; so prohibition denied to spiritual court where a libel for that purpose was exhibited 318

Legislature.

- 203 When the Legislature puts terms upon an offender, no inferior court can hold any other terms to be an equivalent 440
Levanti

TABLE OF THE PRINCIPAL MATTERS.

Case.

Levari Facias.

- 34 Outlawry, the Moveables of a Stranger levant and couchant may be taken on a *Levari facias* Page 51

Letter Missive.

- 272 Decree served on Peer needs no Letter missive 675

Liberty.

- 89 Where a Bailiff is charged directly with a Tort, it ought to be shewn that he is Bailiff of a Liberty who has Return of Writs; but otherwise it is sufficient to shew generally, that he is such a Person as has Authority to take Bail 378

Lord of Manor.

- 44 If a Lord of a Manor cut down Trees where a Copyholder may take them for Repairs, Trespass lieth 71

Mandamus.

- 65 **A** *Mandamus* does not lie to the Spiritual Court after Administration granted 96
55 An Action lies against Members of a Corporation by their private Names for a false Return to a *Mandamus* by their corporate Names 86

Malice.

- 117 Action of the Case does not lie for a malicious Suit, *pendente lite* 190

Marriage.

- 2 Marriage of a Bastard within the Levitical Degrees

Case

- 163 Marriage of the daughter of the wife's sister held within the *Levitical* degrees: so prohibition denied to Spiritual Court, where a libel for that purpose was exhibited Page 318
196 Marriage Articles shall be carried strictly into execution 412
42 Where marriage shall discharge a bond to a feme obligee 67
19 Inveiglement of marriage 27

Manor.

- 181 A grant of a Manor with all advowsons, &c. thereunto belonging, will not extend to an advowson served in antient times, though it was appendant to the manor 300 years ago 361

Merchandize.

- 211 Money received for the drawback of Goods and Merchandize not fairly exported according to the statutes, liable to the King's demand though in the hands of a third person not *Particeps criminis* 481

Misnomer.

- 223 *Misnomer* improper for a demurrer, but ought to be pleaded in abatement 541

Misprision.

- 139 A Misprision of the plaintiff's name instead of the defendant's, amendable after verdict without defence 250

Mistake.

- 244 The mistake of a name of a third third person is not aided or amendable, though a misnomer of the plaintiff or defendant is 566

Mistake

TABLE OF THE PRINCIPAL MATTER

Case

Mitigation.

- 229 In an action for words, upon Not guilty pleaded, whether the defendant can be admitted to give evidence of the truth of the words spoken (when they import a felony) in mitigation of damages
Page 552

Militia.

- 106 A person is chargeable to the militia levy, though it was not exercised
158

Modus.

- 175 Bill to establish *Modus* when proper
697

Mortgage.

- 162 Mortgagee with power to sell, sells with notice of mortgage without mortgagor, his estate redeemable
603
173 A mortgagee shall not be allowed to present to a living that becomes vacant, because nothing can be taken for it, but shall be looked upon as a trustee for the mortgagor or his grantee, and shall present such person as they shall name
343

Mutual Debt.

- 17 Executor may plead payment of rent or debt upon bond *et contra*
145

Navigation.

- 17 Navigation by Mariners of *Russia* good, though not natives
677

U u

Case

New Trial.

- 260 Where a new trial shall be granted for a misbehaviour in one of the jury
Page 601

Negligence.

- 22 When an action of the case lies for negligently keeping his fire in his close, by which the plaintiff was damaged
32

Nil habuit in tenementis.

- 193 If defendant pleads, *Nil habuit in tenementis* to an action of debt for rent brought upon an indenture of lease for seven years, it is a good cause of demurrer
391

Nisi prius.

- 187 The plaintiff in record of *Nisi prius* omitted the words, *et predict. quer. scilicet*; but it was held amendable by the original record
376

Noli prosequi.

- 161 A *Noli prosequi* may be granted upon an indictment against a surgeon for refusing to be constable
312

Non-claim.

- 208 Entry tolled by dissent and non-claim
457

Non decimando.

- 270 Prescription in *Non decimando* against a lay impropriator, held not good
346

Non

TABLE OF THE PRINCIPAL MATTERS.

Case

Non est factum.

- 156 Upon *Non est factum* pleaded to a bail-bond, the defendant admits all other matters against him, and depends upon that for his defence
Page 303

Non-residence.

- 194 Lease of parson void for non-residence when pleaded to a bill brought by lessee for tithes 392

Not guilty.

- 151 In an action founded upon an injury, every thing that shews that the defendant did what he might lawfully do, may be given in evidence upon Not guilty pleaded 273

Notice.

- 162 Mortgage with power to sell, sells with notice of mortgage without mortgagor, his estate redeemable 603
276 A person deemed a trustee if he takes an inheritance after notice of articles to settle the estate. Statute of limitation when pleadable to a trust 700

Non-suit.

- 63 Where the plaintiff has been non-suited for a defect in the declaration, the defendant shall be admitted to common bail in a new action brought 94
46 Plaintiff ought to pay the cost of one non-suit only, where a *Latitat* was awarded against the defendants, though they appeared severally by different attornies, where the nonsuit was for declaring against them in two terms 74

Case

Non compos.

- 30 Whether the surrender of a person that was *Non compos mentis* absolutely void Page 4

Nuisance.

- 38 An action lies not for general nuisance where a particular damage to the plaintiff is not laid

Nul tal Record'.

- 219 Sufficient to insert in the copy the issue, by way of replication a plea of *Nul. tal. Record'*, *habetur tal. Record'*, though under counsel's hand 5

Office.

- 1 **S**ecurity to account for the profits of an office, not a within the statute of Ed. 6, 16.

Order of Removal.

- 53 Order of Justice to remove a and his family, is ill
66 Order of removal ill, because pauper was thereby sent to master, and not to the parish where settled
43 Order of removal not appeal from conclusive to all the w

Order of Justices.

- 54 A *Certiorari* lies to remove a order of justices of the upon a private act of Parlia

Orig

TABLE OF THE PRINCIPAL MATTERS.

Case

Original.

- 77 Error for want of on original, is not compleatly assigned until the certificate is returned *Page* 115
 83 Error for want of an original, another original allowed by the court of Chancery 118

Opus & Labor.

- 132 *Opus & Labor* may signify business or task as well as work and labour 236

Outlawry.

- 34 Outlawry, the moveables of a stranger *Levant* and *Couchant* may be taken on a *Levari facias* 51

Papist.

- 124 **I**F a Papist can suffer a recovery 207
 246 A Papist may devise his estate to be sold in order to pay money he owes another Papist, notwithstanding the statute 11 & 12 *W.* 3. 570

Penal. Statute.

- 48 Special Bail need not be given in an information or action *qui tam* on a penal statute 75

Perjury.

- 27 An information of perjury shall not be supplied by the *Innuendo* 43

Pendente lite.

- 117 Action of the case does not lie for a malicious suit *pendente lite* 190

Case

Peers.

- 202 Peers of *Scotland*, after the Union, shall be intitled to an action of *Scandalum magnatum* *Page* 439
 272 Decree served on Peer needs no letter missive 675

Plea.

- 143 Plea in abatement held bad and repugnant, where it says that there are two persons in *Com' Devon* of the same name without distinction 260
 168 An argumentative plea, not good 330
 185 Plea in abatement, that defendant was a mercer, and no gentleman, as named in the writ, held good 371
 227 Where the trespass is confessed by the defendant in his plea, the plaintiff shall have a judgment tho' a verdict be found for the defendant 548
 95 Discharge of a promise, when a good plea 142
 109 Plea of the performance of a will generally, held bad 161
 96 Plea that defendant fully administered *ante exhibitionem billæ ipsius* the plaintiff, when it ought to have been *ante impetrationem brev. de attachiament'*, held bad 142
 100 In an immaterial issue, defendant shall plead again, tho' after a verdict for plaintiff 148
 122 Bankruptcy how it should be pleaded 205
 70 Where the Court will not hear any argument about the plea on a demurrer before the trial of the issue 109

Place.

- 94 Plea without shewing the place of any thing material, is bad 141

Phad

TABLE OF THE PRINCIPAL MATTERS.

Case

Plead double.

- 199 In an action for an escape, defendant allowed to plead double *Page 422*
 238 Motion to plead double denied, after a judgment that had been regularly obtained was set aside on payment of costs 561

Pledge.

- 195 An account directed for all monies received on sale of stock pledged, notwithstanding the day of redemption was past; it not appearing that the defendant had sufficient stock at the day 393

Plead.

- 97 Executor may plead payment of rent to debt upon bond & *contra* 145

Powers.

- 25 Power to make leases, when well pursued 37

Power.

- 212 Whether a lease for years by tenant for life, in pursuance of a particular power, shall be good against him who claims in remainder 494

Poors rate.

- 220 Whether Chambers within an Inn of Chancery are within the words or intent of 43 *Eliz.* rateable to the poor 534

Popish Recusant.

- 158 In a plea of disability of the plaintiff, that he was Recusant

Case

convict, that he did not take the oaths at the quarter-sessions, it is not enough to say *& hoc parat' est verificare*, unless he adds *per recordum* *Page 307*

Prohibition.

- 159 Where a prohibition shall be granted to the Spiritual Court where a libel is for words spoken of a clergyman, tho' they immediately regard his function 309
 170 Upon a writ of inquiry executed after judgment by default, in prohibition, plaintiff shall have his cost 335
 99 When proof of suggestion in prohibition is necessary 145
 91 Where a prohibition to the Admiralty Court on a libel there for seamen's wages, shall not go 137
 17 Where scandalous words are spoke of the function of a spiritual person, a prohibition shall not go 25
 47 Prohibition shall go to the Admiralty in a suit for the wages of a master of a ship 74
 11 Prohibition to Spiritual Court when granted for fees there 18

Presentation.

- 173 A mortgagee shall not be allowed to present to a living that becomes vacant, because nothing can be taken for it, but shall be looked upon as a trustee for the mortgagor or his grantee, and shall present such persons as they shall name 343

Prescription.

- 183 When a prescription for a seat in a church is found by the verdict, the repairing, which is only a circumstance requisite to support the pre-

TABLE OF THE PRINCIPAL MATTERS.

Case

prescription is of necessity included *Page* 366

- 261 Customs or prescriptions only triable at common law 603

Principals.

- 267 In smuggling goods, all present and aiding are Principals, and equally liable to the whole penalty 616

Proviso.

- 13 Proviso in a deed for the conveyance of an estate for a sum certain, if such person die without issue, held good, notwithstanding a fine levied by them, where the uses were declared otherwise 20

Privilege.

- 176 A man may waive a privilege if it is not what the law prohibits, though he is not obliged to discover what will subject him to a penalty 347

Privilege of Parliament.

- 204 How far privilege of Parliament after dissolution shall be extended 444

Privilege of Arrest.

- 195 Privilege from arrest shall not extend to a person who attends his own cause, after his departure from *Westminster* 411

Process.

- 221 A process to take the body in the first instance, if found, if not, to attach him by his goods, is a void process, and custom will not make it good 537

Case

Promissory Note.

- 240 In an action on a promissory note against drawer, plaintiff need not allege notice to the defendant of the indorsement *Page* 563
251 In an action on a promissory note against the indorser there ought to be evidence of a demand upon the drawer: but that is a fact to be left to the jury 579

Protestant kin.

- 271 Protestant kin, when aided in a Court of Equity 661

Probate.

- 102 Executor may traverse the devise of an executorship to another. Payment to an executor having a probate, if the probate is afterwards repealed, does not discharge the party against the legal executor 150

Promise.

- 95 Discharge of a promise, when a good plea 142

Quare Impedit.

- 179 **I**N *Quare Impedit*, Bishop pleads that he claims nothing but as ordinary, held bad, for want of alleging notice of the refusal, though in case where the crown presented 358

Que Estate.

- 29 Termor for years cannot declare upon a *Que estate*. 44

Recovery

TABLE OF THE PRINCIPAL MATTERS.

Case

Recovery.

- 184 **A** Man devises to his wife in tail general, remainder to *J. S.* in fee, and the wife with a subsequent husband suffers a recovery; held good against the heir of the devisor, notwithstanding the statute 11 *H. 7. c. 20.* *Page 369*
- 191 A mistake in a recovery whereby two of the vills were omitted, allowed to be amended, by the deed that led the uses *386*
- 33 Where an act of Parliament shall have an effect of a recovery *50*
- 84 Tenant in tail covenants to stand seised to the use of himself for life, with remainders, and afterwards suffers a recovery to other uses; the uses on the recovery held good *119*
- 124 If a Papist can suffer a recovery *207*

Return of Writ.

- 35 Fifteen days between the teste and return of two *Scire Facias's* inclusive is sufficient *53*

Remainder.

- 41 When it is contingent and when it vests *62*
- 130 Where there is no devise antecedent, the first son of the wife cannot take by way of remainder *232*
- 84 A man devises to his wife in tail general, remainder to *J. S.* in fee, and the wife with a subsequent husband suffers a recovery; held good against the heir of the devisor, notwithstanding the statute 11 *H. 7. cap. 20.* *369*
- 222 If an estate be given to a man and his heirs, and if he die without issue, remainder over, those words

Case

are explanatory of the word *heirs*, and make an estate tail *Page 539*

Refusal.

- 81 Tender and refusal, how to be pleaded *116*
- 134 An information shall go against the Mayor, where persons intitled to their freedom and demand admittance, are refused *240*
- 136 Where persons have a right to their freedom, the tortious refusal of the Mayor does not make their votes void, for admission is but a ceremony *243*

Replevin

- 85 Plaintiff in replevin shall not pay cost when the writ abates *122*
- 26 An avowant in Replevin may abate his own avowry for part of the rent distrained, before but not after judgment *42*
- 137 When the defendant in replevin makes conuzance, and avows that the property is in himself, it seems to be sufficient without a traverse *247*
- 238 Sheriff may justify by grant of a replevin, without shewing the property of the goods *590*

Restitution.

- 40 Restitution ought to be made immediately upon conviction of a forcible entry *61*

Representation

- 56 There shall be no representation after brothers and sisters children *87*

Re-

TABLE OF THE PRINCIPAL MATTERS.

Case

Reversion.

- 116 Tenant in dower shall not have execution of a reversion after a term
Page 265

Rectory.

- 146 The word *tenement* mentioned in 9 & 10 W. 3. for workhouse corporation of *Colchester*, extends to a rectory
265

Receiver.

- 150 Where tenant in common declares against another as receiver, it ought to be shewn by whose hands he receives it, otherwise he ought to be charged as bailiff
272

Recital.

- 245 In a defeazance to a bond, it is not necessary to recite the bond
568

Register.

- 182 In a contract for stock, it must appear by the register itself to whose use the contract was made
365

Rejoinder.

- 188 In covenant the plaintiff by his replication assigns several breaches, to which defendant does not rejoin; though the plaintiff cannot waive breaches, being entered on the roll, yet he may take judgment for want of the rejoinder
376

Render.

- 232 Render of a prisoner by his bail is not complete till the fees are paid
554

Case

Repair.

- 268 Covenant of repair binds though house burn
Page 627

Repairing.

- 183 When a prescription for a seat in a church is found by the verdict, the repairing, which is a circumstance requisite to support the prescription, is of necessity included
366

R. pugnans.

- 143 Plea in abatement held bad and repugnant, where it says, that there are two persons *in Com' Devon* of the same name without distinction
260

Repugnancy.

- 128 Whether words in the condition, which are repugnant to the plain intent of the parties, shall be rejected
231

Review.

Commission of review obsolete

Residue.

- 174 Upon a settlement of lands to be sold in trust for several purposes, the residue is given to *B.* and his heirs, reserving only 200*l.* to be paid to such person as the donor should by writing under his hand direct, who died without any such direction, the 200*l.* will go to his heir, and not to *B.* or his assigns
345

Revivor.

- 257 Bill of revivor lies not by assignee of the Clerk of the Peace
589

Revocation

TABLE OF THE PRINCIPAL MATTERS.

Case

Revocation.

- 140 The same circumstances ought to be proved to be performed to make good a revocation in equity as at law, unless prevented by the person interested. *Page 250*
- 207 A will sufficient to pass a personal estate will not amount to a good revocation of a former will, whereby the real estate is devised, according to the statute of frauds *451*

Right of Common.

- 250 Right of common of pasture will not hinder the lord's improvement by inclosure, leaving sufficient common for the tenants of the manor *578*

Robbery.

- 166 In an action upon the statute *Ed.* 1. for a robbery, it ought to appear that the plaintiff has the whole property in the money of which the robbery was committed, or otherwise if intire damages be given, it will be bad *in toto* *327*
- 175 An action lies upon the statute 13 *E.* 1. against the hundred for a robbery committed on a *Sunday*, notwithstanding 29 *Car.* 2. if it appears the person robbed was only going to his parish church. *345*
- 210 On a special verdict in an indictment for a robbery on the highway, the words *then and there immediately* do not sufficiently ascertain the time to find the prisoner guilty *478*

Case

Scire Facias.

- 35 **F**IFTEEN days between the *teste* and return of two *scire facias*'s inclusive, is sufficient *Page 53*
- 247 In a *scire facias* on a recognizance of bail defendants demurred, because it was not sufficiently averred, that the plaintiff was the same person to whom they were bound; but held no cause of demurrer *573*

Scandal.

- 17 Where scandalous words are spoken of the function of a spiritual person, a prohibition shall not go *25*

Scandalum Magnatum.

- 202 Peers of Scotland after the union shall be intitled to an action of *scandalum magnatum* *439*

Security.

- 209 Not reasonable to decree a deposit back, which is made by way of security to any one, where the person had a proper power and authority to make it *462*

Seamens wages.

- 91 Where a prohibition to the admiralty court on a libel there for seamens wages shall not go *137*

Sheriff.

- 145 Sheriff cannot take bail-bond upon attachment for a contempt *264*

243 The

TABLE OF THE PRINCIPAL MATTERS.

Case

- 243 The sheriff's deputy to be entered upon record Page 566
 158 Sheriff may justify by grant of a replevin without shewing the property of the goods to be in the plaintiff 590
 89 A sheriff shall not take advantage of his own irregularity to excuse himself in an action 132

Smuggling.

- 167 In smuggling goods, all present and aiding are principals and equally liable to the whole penalty 616

Spiritual Court.

- 131 Words which do not directly charge the party with being a whore, are not such where the jurisdiction of the spiritual court ought to be disallowed 235
 65 A *mandamus* does not lie to the spiritual court after administration granted 96
 106 Where articles in the spiritual court are declared null, parties may object below again originally 448

Statute of Limitation.

- 36 A conditional promise will avoid the statute of limitations 54

Stock.

- 182 In a contract for stock it must appear by the register itself to whose use the contract was made 365

Surplusage.

- 18 Where an action lies against the defendant at common law, the words *contra formam statuti* in

Case

the declaration shall be rejected as surplusage Page 26

Submission.

- 225 A submission of all matters in difference, imports all matters which either party had jointly or severally against each other 547

Surgeon.

- 161 A *Noli Prosequi* may be granted upon indictment against a surgeon for refusing to be constable 312

Survive.

- 21 The benefit of a judgment against husband and wife shall survive to the plaintiff 31
 280 Husband dying before legacy was payable to his wife, it is in the nature of a *chose in action*, which will survive to the wife 725

Surrender.

- 30 Whether the surrender of a person that was *Non Compos Mentis* is absolutely void 45
 52 Surrender of a copyhold to the deputy of a deputy-steward out of court is good 84

Suggestion.

- 99 When proof a suggestion in prohibition is necessary 147

Tenant in Common.

- 58 A COPYHOLD estate surrendered to several equally to be divided, and to their respective heirs, is not a joint-estate but an estate in common 88

150 Where

TABLE OF THE PRINCIPAL MATTERS.

Case

- 150 Where tenant in common declares against another as receiver, it ought to be shewn by whose hands he receives it, otherwise he ought to be charged as bailiff *Page 272*

Tenant in Tail.

- 84 Tenant in tail covenants to stand seized to the use of himself for life, with remainders, and afterwards suffers a recovery to other uses, and the uses on the recovery held good *119*

Tenant to the Præcipe.

- 242 Whether a husband seized jointly with his wife, can without her make a good tenant to the *Præcipe* *564*

Tender.

- 153 Tender that plaintiff was ready to pay what was due for the copy of a poll, till the officer demands something certain, held a good tender *279*
81 Tender and refusal how to be pleaded *116*

Tenant for Life.

- 212 Whether a lease for years by tenant for life, in pursuance of a particular power, shall be good against him who claims in remainder *494*

Teste.

- 82 Execution bearing *teste* before the judgment signed when good *117*

Termor for Years.

- 29 Termor for years cannot declare upon *Que Estate* *44*

Case

Term for Years.

- 149 A term for years held by a qualification for a commissioner of the land-tax *Page 270*

Tenement.

- 146 The word *tenement* mentioned in 9 & 10 Will. 3. for the workhouse corporation of *Colchester* extends to a rectory *265*

Testator.

- 154 A limitation to one to take and enjoy the profits of an estate during his life, and after his decease to the heir male of his body, would make an estate-tail where nothing appears that explains the testator's intent to the contrary, otherwise not *289*

Terms.

- 203 When the legislature puts terms upon an offender, no inferior court can hold any other terms to be equivalent *440*

Town-Books.

- 234 In an action *qui tam* on statute *Ann.* against a custom-house officer, the plaintiff hath a right to inspect town-books, and take copies to be used at the trial *555*

Traverse.

- 155 Inducement to a traverse insufficient where the traverse is a thing immaterial *302*
254 Where interest is in land, or claimed out of it, the plaintiff can't reply *de injuria sua propria*, but ought to traverse the right *582*
137 When

TABLE OF THE PRINCIPAL MATTERS.

Case

- 137 When the defendant in replevin makes conuzance and avows, that the property is in himself, it seems to be sufficient without a traverse *Page 247*
- 104 If a plea be to an action brought by one as administrator, that *A.* made an executor, he ought to traverse that *A.* died intestate 156

Trover.

- 110 Where executor shall pay cost in trover 162

Trust.

- 125 If a trustee has conveyed lands before execution sued, though he was seized in trust for the defendant at the time of the judgment, the lands cannot be taken in execution 226

Trespass.

- 127 Where the trespass is confessed by the defendant in his plea, the plaintiff shall have judgment though a verdict be found for the defendant 548

Trustee.

- 176 A person deemed a trustee if he takes an inheritance after notice of articles to settle his estate. Statute of limitation when pleaded to a trust 700

Tythe.

- 14 Turning cattle into tythe makes it a fraudulent severance 22

Tythes.

- 194 Lease of parson void for non-rentance when pleaded to a bill

Case

- brought by the lessee for tythes *Page 392*
- 213 Unity of possession of a manor and rectory will not exempt the demesne lands from the payment of tythes when they come to be severed 498
- 269 Tythe of clover-seed due to vicar 633

Undertaking.

- 237 **H**OW far an undertaking for a third person shall bind 558

Unity of Possession.

- 213 Unity of possession of a manor and rectory will not exempt the demesne lands from the payment of tythes when they come to be severed 498

Usury.

- 255 Usury, what shall be so 583

Uses.

- 84 Tenant in tail covenants to stand seized to the use of himself for life, with remainders, and afterwards suffers a recovery to other uses; the uses on the recovery held good 119

Use.

- 108 Settlement by heir on the part of the mother to the use of himself in fee shall be to the old use 160

Venire facias de novo.

- 138 **I**F the jury is discharged at the assizes for a view, there is no need of a *Venire facias de novo* 248

Venu.

TABLE OF THE PRINCIPAL MATTERS.

Case

Venue.

- 233 If an action be laid in one county, and the *venue* in another, it is a *Jeofail*, and helped by the 4th and 5th of *Anne* Page 555

Verdict.

- 216 Verdict set aside where the jury cast lots how they shall give it 525
 217 Where a verdict hath found words spoken of the plaintiff as brother of the defendant, it is sufficient though no averment in the declaration that he was his brother 528
 236 Where the name of the defendant is made use of in the declaration by mistake, instead of the plaintiff's, it shall be helped after a verdict 557
 7 Where a verdict aids a fact alledged in the declaration at a day impossible, but not as a day between the declaration and the verdict 12
 59 *Assumpsit* to deliver oameal on board a vessel to be brought by the plaintiff on or before the 18th of January; breach that he did not deliver upon the 18th is good after verdict 89
 76 Declaration in an action on the case for a way when helped by a verdict where the particular sort of way is not shewn 114
 80 Declaration where helped by the verdict 116
 100 In an immaterial issue defendant shall plead again, though after a verdict for plaintiff 148
 79 After a verdict the words, *ad usum defendantis* instead of *ad usum Querentis*, shall be rejected 115

Vests.

- 41 Remainder when it is contingent, and when it vests 62

Case

Vests.

- 41 Remainder when it is contingent and when it vests Page 62

Vested Interest.

- 279 Where an interest is actually vested in any one, it will go to their executor, otherwise not 710

Void.

- 221 A process to take the body in the first instance, if found, if not, to attach him by his goods, is a void process and custom will not make it good. 537

Voluntary Conveyance.

- 141 A voluntary conveyance bad against bond-debts contracted afterwards, in a Court of equity 255

Waiver.

- 176 **A** Man may waive a privilege, if it is not what the law prohibits, though he is not obliged to discover what will subject him to a penalty 347

Will.

- 119 Where a will is well executed within the statute of frauds, &c. 197
 109 Plea of the performance of a will generally, is bad 161
 190 A codicil signed and published in the presence of three witnesses, held a republication of the will, and that both made but one will 381
 207 A will sufficient to pass a personal estate will not amount to a good revocation

TABLE OF THE PRINCIPAL MATTERS.

Case
 cation of a former will, whereby the real estate is devised, according to the statute of frauds

Page 451

18 Whether it shall be left to a jury to determine whether the witnesses to a will (being all dead) set their names in the presence of the testator, merely upon Circumstances, without any positive proof 531

Witnesses.

65 Will not read on proof of witness's hand, unless there be positive proof that he is dead 614

18 Whether it shall be left to a jury to determine whether the witnesses to a will (being all dead) set their names in the presence of the testator, merely upon circumstances, without any positive proof 531

6 A devisee not a sufficient witness to a will within the statute of frauds 90

Words.

31 Words which do not directly charge the party with being a whore are not such where the jurisdiction of the Spiritual court ought to be disallowed 235

44 Words, *That I never forged any man's hand, but you are a forging rogue* when spoken of an attorney, held actionable 262

Case

147 An allegation in an action for words, that *præd' Jana adtunc & ibidem colloquium habens cum seruo quer'*, is sufficient, for the *adtunc* refers to the whole clause Page 267

229 In an action for words, upon Not guilty pleaded, whether the defendant can be admitted to give evidence of the truth of the words spoken (when they import a felony) in mitigation of damages 552

Writ of Enquiry.

170 Upon writ of enquiry executed after judgment by default, in prohibition, plaintiff shall have his cost 335

228 Notice of executing a writ of enquiry ought to ascertain time and place where it is to be executed 551

Writ of Error.

164 Upon a writ of error brought after judgment, execution ought not to be stayed if bail be not found 321

235 Bail shall be given in an action of debt on a judgment notwithstanding a writ of error, if no bail in the original action, otherwise not 556

241 An *exigent* is superseded by a writ of error 564

F I N I S.

E. W. C. F.

9/1/09



